

RARY
***THE CONTEMPORANEOUS APPLICATION OF ENGLISH
AND FRENCH CONTRACT LAW IN CAMEROON***

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ABSTRACT OF THE THESIS.

As a physical presence, there does exist some form of contract law in Cameroon. This consists mainly of the English common law of contract, the French civil law of contract and to a lesser extent, the customary or indigenous contract laws of Cameroon. One might expect that these three, if put together, will produce what can be termed a Cameroonian contract law. Yet the status of such a Cameroonian contract law, considered in such terms, remains very uncertain for three reasons.

Firstly, while contract law in England and France can easily be found in the great mass of relevant reported decisions of their courts, in the great relevant statutes passed by their legislators and in the learned commentary on the subject, the same cannot be said of Cameroon where there is at present no law reporting, very little by way of legislation relating to contract law, and hardly any learned commentary on the subject of contract.

Secondly, contract law as applied by the courts is surely disfigured in some way by the persistent deference to English and French authority (some of which is dated), and thus stuck in the habit of derivation from foreign sources of diminishing relevance.

Finally, the courts and the legislator, by their continuous neglect of relevant indigenous laws, have failed to sufficiently "Cameroonise" the law of contract. The need to respond to the first problem and to elaborate on the second and third problems combine to form the focus of this thesis. This thesis therefore determines the place of customary contract law and its role, if any, vis-à-vis, the inherited western laws, examines and analyses the operation of English and French contract laws in Cameroon, bearing in mind any important developments in these two countries and provides a detailed overview of contract law in Cameroon.

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CHAPTER ONE.

INTRODUCTION.

The name Cameroon is derived from the Portuguese word, *Cameroes*, meaning shrimps. It is now variously spelt as *Kamerun* in German, *Cameroun* in French and Cameroon in English. I shall use the English spelling in this study, unless historical and other reasons dictate otherwise.

Cameroon was first colonised by the Germans in 1884 but with the defeat of Germany in the First World War, she was partitioned between Great Britain and France. Under the terms of the partition agreement, Britain gained control of about a third of the country while France controlled the rest.

In 1961, British Cameroon (Southern Cameroon) and the already independent ex-French Cameroon (Republique du Cameroun) re-united to form the Federal Republic of Cameroon. This federation was made up of two states - West Cameroon (the former British Cameroon) and East Cameroon (former French Cameroon). By national referendum in 1972, the federal state gave way to a unitary system and Cameroon became known as the United Republic of Cameroon. Since 1984, and by Presidential decree, Cameroon is simply known as the "Republic of Cameroon".

The country is administratively divided into ten provinces, two of which are made up of the former British Cameroon, later West Cameroon, hereinafter referred to as Anglophone Cameroon or Common Law Cameroon, with the other eight deriving from the former French Cameroon, later East Cameroon and hereinafter referred to as Francophone Cameroon or Civil Law Cameroon. The official languages are English and French.

Cameroon covers an area of 183,000 square miles with a population of about 12 million inhabitants. Yaounde (in Francophone Cameroon) is the capital and the seat of the Supreme Court.

1. THE CAMEROONIAN LEGAL AND JUDICIAL SYSTEM: A CONFLUENCE OF TWO LEGAL TRADITIONS.

The origins of the common law and civil law in Cameroon are traceable to the English common law and French civil law systems. As already mentioned above, at the end of World War One, Cameroon which was already a colony of defeated Germany, was handed over to Great Britain and France under a League of Nations Mandate. On the creation of the United Nations after World War Two, the status of Cameroon was changed to that of a Trust Territory but her partition between Britain and France was recognised and maintained. As soon as Britain and France gained control over Cameroon, they set about introducing their particular systems of law in their respective parts, of which Britain controlled about a third while France controlled the rest.

It had long been established in *Calvin's* case,¹ that English settlers are deemed to carry the common law with them whenever they settle new territory. Prior to acquiring part of Cameroon, Britain already controlled neighbouring Nigeria as a colony, where the common law, doctrines of equity and statutes of general application that were in force in England on or before January 1, 1900, had been earlier introduced. By a series of proclamations, Britain extended the application of English law that was already in Nigeria to her part of Cameroon.² But Britain did not just introduce her laws. She was equally concerned with the erasing of German law, so it was decreed that German law, in so far as it was previously in force, was automatically superceded by English law.³

1 (1608) 7 Co. 1, 176, 77 E,R 397.

2 Nigerian Gazette, no.15 of 19/3/1918.

3 The British Cameroons Ordinance No.3 of 28/2/1924. See also the 1922 British Reports for Cameroon, pp. 77-78.

In 1951, the southern part of British Cameroon (the present day Anglophone Cameroon) broke away from Nigeria, obtained her own separate legislature and soon after, a separate judiciary. But these changes were not to put an end to the use of English law that had already been received via Nigeria. In order to continue with the tradition of English law, section 11 of the Southern Cameroons High Court Law 1955 proclaimed that the general law to be applied by the courts in Southern (British) Cameroon should consist of (a) the common law, (b) doctrines of equity and (c) statutes of general application which were in force in England on or before January 1, 1900, in so far as these laws related to any matter with respect to which the legislature of Southern Cameroon was for the time being competent to make laws. Therefore, by the time Southern Cameroon united with French Cameroon to form the Federal Republic in 1961, English law had firmly taken root there.

With regard to French Cameroon, France also took swift steps to endow it with a system of law that was based upon French law. This began with the enactment of a reception statute. Article 1 of the Decree of 22 May, 1924⁴ rendered executory in the territory of Cameroon placed under the mandate of France the laws and decrees promulgated in French Equatorial Africa prior to January 1, 1924. Article 2 of that decree provided that such legislation would be applicable only in so far as it was not contrary to decrees made especially for Cameroon.

One other significant result of the 1924 decree was that all existing German law was replaced except to the extent that it was not expressly or impliedly contrary to French law or the principles of the new regime.⁵

Having introduced the basic body of French law to French Cameroons, France went on to impose a great mass of legislation upon it during the remainder of the colonial era. This was done by means of laws and decrees that either enacted legal principles especially for the colonial federations or mandates or declared applicable to them legislation already in force in France. In fact, for the most part, the law

4 See Article 1, Journal Officiel du Cameroun 1924.

5 Dareste: *Traité de Droit Colonial*, 1931, p. 260, cited in Salacuse: **An Introduction to the Law in French-speaking Africa, volume 1 - South of the Sahara**, 1969, p. 29.

imposed on Cameroon and other French speaking African territories was the same as or similar to the law in France.

Neither autonomy nor independence could serve to wipe out the laws that Britain and France had introduced in their respective portions of Cameroon. The modern legal system of Cameroon, therefore, comprises two distinct legal traditions. In most areas of substantive private law, such as the law of persons (family law),⁶ law of obligations (contracts and tort), law of matrimonial regimes and certain aspects of commercial law, the English common law is firmly entrenched in Anglophone Cameroon while the same is true for French civil law in Francophone Cameroon.

The laws of civil procedure are also different.⁷ By contrast, the substantive rules and procedures of the public law component (constitutional and administrative law, for example) throughout Cameroon reflects mainly the civil law. This is because the distinctive character of *Droit Public* in French law was extended to Common Law Cameroon via Civil Law Cameroon.⁸

A few areas of the law have already been harmonised. A notable example is the Penal Code which is of uniform application throughout the national territory. The Penal Code is said to have drawn inspiration not only from English and French criminal law notions, but equally from sources as diverse as the Swiss, the Brazilian, the German and the Italian Codes.⁹ Be that as it may, one must emphasize the fact it is predominantly fashioned on French penal notions. Also of uniform application

6 See Ngwafor, "*Family Law Trends in Cameroon: A Non-Developmental Process*" (1985) Annual Survey of Family Law, pp. 5-15; also see generally Nkouendjin: *Le Cameroun à la Recherche de son Droit de la Famille*, 1975.

7 For a comprehensive discussion of the law of civil procedure in France, see Herzog and Weser: *Civil Procedure in France*, 1967.

8 See the discussion on *contrats administratifs* and *contrats civil* in chapter 4.

9 Fombad, "*The Scope for Uniformised National Laws in Cameroon*" (1990) no. 3 Rev. Jur. Afr. 63; See also the following articles by some of the draftsmen of the code:

Clarence-Smith, "*The Cameroonian Penal Code: Practical Comparative Law*" (1968) 17 I.C.L.Q. 651, and Parant, Gilg, and Clarence-Smith, "*Le Code Penal Camerounais, Code Africain et Franco-Anglais*" (1967) Rev. Science Criminelle 339.

are the Labour Code, the Highway Code, the General Tax Code and the Land Tenure Code. These codes generally embody elements of both common and civil law traditions, with the latter dominating in most respects.

As for Cameroon's judicial system, its history so far can be described as one of many changes. As this has been very well documented,¹⁰ there is no need to discuss it here. It is sufficient for the present purpose to briefly describe the current structure which was set up by the *Judicial Organisation Ordinance 1972*,¹¹ which purported to introduce a uniform system of courts throughout the national territory to take account of Cameroon's new unitary status. Although this unified court structure was supposed to be an attempt at a synthesis of the former structures in the now defunct federated states of West Cameroon (British) and East Cameroon (French), the result, undeniably, is a structure very akin to that in France. It comprises four courts with ordinary jurisdiction and three courts with special jurisdiction. Only those courts with whose decisions this study shall be dealing are briefly considered here. They include the following:-

First Instance Courts (*Tribunaux de Premier Instance*): these courts were in operation in Francophone Cameroon prior to 1972. Today they operate throughout the country, having replaced the Magistrates Courts that operated in Anglophone Cameroon before 1972. They are the lowest rung in the judicial ladder i.e. if customary or native courts¹² are excluded. They have original jurisdiction in both criminal and civil matters. Since 1987¹³ their jurisdiction in civil matters (contracts

10 See generally, Anyangwe, *op. cit.*, note ; Fouman Akame, "Les Grandes Etapes de la Construction Juridique au Cameroun de 1958 a 1978" (1979) 89 Pennant 189; Martiou-Riou, "L'Organisation Judiciaire du Cameroun" (1969) 79 Pennant 32; Nguini, "La Cour Federale de Justice" (1973) 3 Rev. Cam. Dr.

11 Ordinance No. 72-4 of 26 August 1972, as amended.

12 These are courts of special jurisdiction and they are primarily concerned with customary law. English or French law cannot be pleaded in these courts.

13 Articles 13 and 16 of the Judicial Organization Ordinance 1972 limited their jurisdiction to claims of up to 500.000 francs but Law No 89/017 of 28 July 1989 as amended by Law no. 89/019 of 29 Dec. 1989 increased that amount to 5.000.000

included) is limited to claims of up to five million francs CFA.¹⁴ Career magistrates (requiring a degree in law and some professional training) preside in these courts. In principle, every administrative Sub-division in Cameroon should have a First Instance Court.

The High Courts (*Tribunaux de Grande Instance*): these are also first instance courts in the sense that they have original jurisdiction. A high court is presided over by a single judge, except in labour cases where two assessors must sit with the judge. The difference between the high court and the magistrates court, *inter alia*, is that in civil matters the high court has jurisdiction over all suits in which the claim is over five million francs. Many decisions of the various high courts will therefore be considered during the course of this study. They are several high courts because each administrative division is entitled to one.

The Courts of Appeal: they are ten altogether, with one in every province. They have appellate jurisdiction and hear appeals from customary courts, first instance courts and high courts of their respective provinces. The courts of appeal are very important because for many Cameroonians, it is as far as they are prepared to litigate. This is not to suggest that appeals are never taken to the Supreme Court. The problem is that the prohibitive costs and delays involved in pursuing an appeal right up to the Supreme Court actually discourages many litigants from getting that far. This is especially true of Anglophone litigants and counsel who will also have to put up with a different language (French) and different legal procedures.

The Supreme Court: It is permanently based in Yaounde (the capital) and operates very much like the *Cour de Cassation* in France. For example, it rarely decides a case on its merits. It hears applications alleging error of law and decides

francs CFA.

¹⁴ The currency used in Cameroon and most of French speaking West and Central Africa is known as the Franc CFA. Prior to the devaluation in January 1994, it had a fixed parity to the French Franc at 50-1 i.e 50 francs CFA = 1 French Franc. Although officially the devaluation was by 50%, in practice it is by 100% because the exchange rate is now 100 Francs CFA to 1 French Franc. The Franc CFA changes at roughly 800 Francs CFA to the pound sterling. Francs as used in this thesis shall mean Francs CFA. Where the French Franc is involved, I will specifically state so.

only on questions of law, not of fact.¹⁸ The Supreme Court cannot interfere with the finding of fact made by the court which tried the case. The Supreme Court generally considers matters relating to the interpretation of contracts as a question of fact¹⁹ and therefore within the *pouvoir souverain* of the trial judge. This does not mean that the trial judge has a completely free hand. The Supreme Court retains its power of control in the event that the trial judge's interpretation of the primary facts is so unreasonable that he can be said to have been distorted (*dénaturer*) them.

If the Supreme Court is satisfied that a Court of Appeal has erred in law in any matter before it, it quashes the decision in question and remits the case to another Court of Appeal or to the same court but with a different panel. This is known as the process of *renvoi*. The practice so far has been to remit appeals from the Anglophone provinces (i.e. of common law provenance) to one of the two Courts of Appeal in that part of the country while appeals originating from Francophone Cameroon are remitted to any of the eight Courts of Appeal in the Francophone provinces. But the Supreme Court may give a final decision if a particular matter comes before it a second time. To the extent that the Supreme Court entertains appeals emanating from the common law courts (to which it applies the common law if it decides to make a final ruling), it is similar to the House of Lords, which also hears appeals from Scottish courts, and to which it applies Scottish law.

It is clear from the foregoing exposition that the English common law and French civil law inherited by Cameroon are still very much alive today. French speaking Cameroon is derivatively¹⁹ a civil law jurisdiction because the legal principles that are employed in the area of private law, practice and procedure belong to the civil law tradition. Contract law, for example, is governed mainly by the Cameroonian Civil

18 For more on the role of the French *Cour de Cassation*, and by analogy the Cameroonian Supreme Court, see Planiol et Ripert, *Droit Civil*, vol. V11, para. 855.

19 See Marty/Raynaud, *Les Obligations*, t. 1, 1988, para. 244.

19 See Watson, *The Making of the Civil Law*. 1981, p. 10. According to Watson, the term 'derivative civil law jurisdiction' refers to a country which historically was not part of the civil law world but rather derives its civil law system from others which had accepted the *Corpus Juris Civilis*. (Cameroon squarely fits into that description).

Code,²⁰ which is a near facsimile of the French Civil Code. For similar reasons, English speaking Cameroon is derivatively a common law jurisdiction. But if the legal and judicial system is viewed in its totality, it is easily seen that even though there is always a common law flavour, the civil law has been more dominant in those areas where attempts at harmonisation or uniformity have been made. For instance, the legal institutions - the structure and competence of the courts, the relationship between the courts and legislative organs, the character of the legal profession and the system of legal education - follow the traditional French civil law approach. Further, the legal principles employed in the area of public law throughout Cameroon largely belong to the civil law tradition. How best then to describe the Cameroonian legal system, is not easy to say. It is common for commentators to refer to it as bijural, yet if one is to consider the gradual cross-fertilisation of legal ideas that is slowly diminishing and blurring the dividing line between the two systems, one may prefer to refer to it as a system *sui generis*.

2. THE AIM OF THE STUDY.

The aim of this thesis is simple. It is to provide an insight into the state of contract law in Cameroon: what it has been, how it has fared and the observed trends for its future development. This entails (i) determining the place of indigenous or customary contract law and its role, if any, in relation to the inherited western laws, and (ii) examining and analyzing the content and operation of the English common law and French civil law of contract in the Cameroonian context. The latter objective is by far the major preoccupation of this thesis.

Given the different nature of the common law and civil law approaches to contract law, this study is intended to serve the growing need to examine and expose the respective developments in the law of contract in Cameroon and to highlight some of

20 The Cameroon Civil Code is largely a copy of the French version. The provisions and the arrangement are exactly the same, except in cases in the few instances where a particular provision has been abrogated in Cameroon. In both Codes, the provisions on contracts can be found in Book 111, Title 111. Book Three is entitled, "*Of The Different Ways In Which Property Rights Can Be Acquired*" while Title 111 is entitled, "*Of Contracts or Obligations Based On Conventions In General*."

the different contractual ideas and judicial attitudes manifested by these systems. This should promote a better appreciation of both systems as well as provide essential keys to the understanding of these systems from a Cameroonian perspective. This is particularly important because the vast majority of Cameroonian lawyers (academics and practitioners alike) are trained either under the common law or the civil law, but not in both. Only a few can actually claim to be conversant with both systems.

Mindful of the argument that variations in the political, moral, social and economic values which exist between any two societies make it hard to assume that many problems are the same for both except on a technical level, it does need to be asked whether the needs and expectations of society and commerce in Cameroon differ from those in England and France in a way that calls for a different contract law or a different approach to contract law. For instance, is the legal problem relating to the requirement of writing in contracts the same both in Cameroon where illiteracy is widespread and in France or England where it is much less common. And can the legal problem of enforceability of contracts against minors be the same both in England and France on the one hand, where young people become accustomed to living on credit and start residing away from their parents at a much younger age and in Cameroon on the other hand, where credit is not readily available to any one, never mind young people and where it is very common to find children living and depending on their parents even into adulthood.

Siedman has stated, with some justification, that

"the simple adoption of western laws and customs often fails adequately to meet the needs of developing nations. A host of differences between established countries and the less developed states frequently make the received laws inappropriate for the newer nations".²¹

Why the same set of rules should produce different results in England and Cameroon for instance, can be explained by what Siedman calls the "law of the non-transferability of laws".²² By this, he means that a rule that induces one sort of activity in a particular social, political and economic milieu will not necessarily induce

21 Siedman, *"The Communication of the law and the Process of Development"* (1972) 3 Wins. L. R. 686.

22 Siedman, *op.cit.*, note 21, 697.

the same activity in another social, political and economic milieu, save fortuitously. This study should provide the facts with which to test the validity of that statement with regard to contract law in Cameroon.

It should be unnecessary to say, but I do so *ex abundante cautela*, that this study is not intended in derogation of English or French law. Neither is it intended to serve as a clarion call for a complete repudiation of "foreign law" in Cameroon. Not only would that be sheer sentimental nonsense and wishful thinking, it would also be legally undesirable and irresponsible. In fact, if Cameroonian legislators were ever to be inspired by chauvinistic nationalism to repudiate the English and French models which are legacies of long centuries of experience, they would inevitably raise obstacles to the development of the law and the economy of the country.

In a way, this study aims to encourage and contribute to the analysis and reformulation of the law of contract in Cameroon in much the same way as those other countries whose laws are traceable to the common and civil law systems have done. The archetypal case is Canada, whose laws are also based on English and French law. Other good examples include Australia, New Zealand, the common law states of U.S.A.,²³ and the civil law state of Louisiana in the U.S.A. whose law is based both on civil law (French and some traces of Spanish law) and common law.²⁴

Finally, a word on reform. It was no revelation to me to discover during fieldwork that Cameroonian lawyers and judges are generally agreed on the need for some reform in the law of contract. What I found surprising was the fact that most of them were either unwilling or unable to articulate with any kind of precision or certainty what exactly it is that needs to be reformed and how it should be done. This is not to disparage Cameroonian lawyers. I prefer to see this as support for the assertion that the shape, the content and the status of contract law in Cameroon is still uncertain. Further, I consider Cameroonian lawyers to be both miscreants and victims of this situation. Miscreants because they have failed to provide the necessary source materials on the law in Cameroon and victims because without such materials, they

23 See e.g. The Restatement of Laws, Second, Contracts 2d., 1979.

24 See Osakwe, "Louisiana Legal System: A Confluence of Two Legal Traditions" (1986 supplement) 34 A.J.C.L. 29.

are sometimes left to sail on in ignorance on some important aspect of the law. For this reason, I must stress that the emphasis of this work will be with analysis rather than reform. So often, the cause of the former is ill-served by confusing it with the latter. In order to reform something, one needs to know exactly what it is that needs reform. There is no point raging against something if one is not exactly sure against what one is raging about. That said, and notwithstanding the fact that the art of prophecy and that of law reform are not easy, I shall be willing to vouchsafe proposals and suggestions for reform whenever I find that there is clearly the need for changes in judicial attitudes or legislative control.

3. *WHY THE LAW OF CONTRACT.*

It is not difficult to find justification for an inquiry into any branch of law in Cameroon. This is because of the staggering dearth of subject-specific literature on almost any topic of the law.²⁵ This is not the place for an inquest into the causes of the conspicuous absence of local judicial literature. Suffice it to say that legal practitioners blame it on academics while academics in turn advance several excuses, many of which are indefensible. For example, the diffidence of Cameroonian scholars to produce any coherent treatise on the working of the law has been excused or explained on the rather unconvincing suggestion that the law in Cameroon is based on the law of their erstwhile colonial masters. The insinuation here is that the rich literature on contract law in England and France dispenses with the need for any critical study of the subject in Cameroon.²⁶ This is a most lame excuse as it begs the question as to why there has been so much writing on the subject in jurisdictions such as the U.S.A, Canada, Australia, Nigeria²⁷ and Ghana,²⁸ whose contract laws

25 Dion-Ngute, *Standard Form Contracts in Cameroon*. Ph.D. thesis, University of Warwick, 1980 seems to be only work in contract law which incorporates a fair amount of local case law and legislation.

26 This is the impression I got from talking to some lecturers in the University of Yaounde.

27 Achike, *Nigerian Law of Contract*, 1972; Sagay, *The law of Contract in Nigeria*, 1985; and Uche, *Contractual Obligations in Ghana and Nigeria*, -1971; not to

are also traceable to English and French laws.

There is also the tiresome excuse of lack of sufficient contractual litigation in Cameroon to warrant a study of this kind. It is not possible to give an accurate response to this problem because of the absence of official records and law reporting. However, from my fieldwork experience, I would say that between the period 1960-1992, the Anglophone courts have had to deal with no less than 800 contract cases while the Francophone courts, especially those in the big commercial centres have certainly disposed of more.

This is not to say that there are no problems with regard to local case law. First, it is difficult to come by because of the absence of law reporting and the lack of proper archives. Secondly, the cases that one lays ones hands on centre mainly on a few issues such as a the breach of a simple straightforward sale. In this respect, the major problem for any researcher, is the lack of variety in contractual litigation rather than the mere lack of cases. For example, I have been unable to find any Cameroonian cases (common and civil) on the questions whether a letter accepting an offer of a contract is effective on despatch or how a contract is affected by mistake in the identity of the other party. Similarly, one does not find many cases in which the issue turned on the presence or absence of *cause* or consideration.

In carrying out fieldwork, I also discovered that a good many contractual disputes do not lead to litigation. There are two possible explanations for this. First, is the ignorance of the legal process. It is the belief of many Cameroonians, especially those living in rural areas with no courts and legal practitioners, that the Police and Gendarmes are there to sort out all kinds of legal problems, criminal and civil alike. It is therefore not uncommon for a party to entreat the help of the Police in purely civil and commercial matters, such as the refusal to perform a contract. Interestingly enough, this is not always without success. Even where rural people settle their disputes without the involvement of the Police, they do so in customary courts or village councils where only native law applies.

The second reason involves costs. In Cameroon, litigation can be costly both in

mention regularly published articles.

28 Uche, op. cit., note 27.

terms of money and in its adverse effect on personal relationships. In a country where the individual's social security is guaranteed by the extended family, friends and the local community, it is not surprising that people are not too eager to bring suits against members of these groups. I noticed that people do readily litigate where the amount of money in question is large in relation to the cost of litigation, and where personal relationships are not too involved or where no future relationship is anticipated.

Because of the absence of law reporting, the lack of variety in contractual litigation, and the reluctance of some to litigate, it becomes difficult in some situations to state with certainty what the response of the Cameroonian courts would be, since the lack of judicial authority on any given point may suggest that either the problem does not really exist, or if it does, that it has not yet occupied the time of the Cameroonian courts. But I remain unwilling to conclude, from the evidence of the lack in variety in contract cases, or from the evidence that many disputes do not lead to litigation, that any study of contract law in Cameroon is unimportant or irrelevant. Neither can it be seriously suggested that of those that are litigated, the great bulk of which remains unknown and uncited, there cannot be some constituted apparatus of contract law.

As a jurisprudential prelude to this thesis, one may also question the relevance of the study of a subject that had been proclaimed dead in 1974 by Grant Gilmore's provocative book, **The Death of Contract**.²⁹ That spawned a new era of discussion and speculation on the nature of contract especially in the United States and Canada.³⁰ The debate was taken up in England by Atiyah.³¹ All that can be said as far as Cameroon is concerned, is that the topic excited no interest whatsoever. On

29 Gilmore, *Death of Contract*, 1974.

30 In the United States, see for example, Barnett, "A *Consent Theory of Contract*" (1986) 86 Col. L. R. 269 and in Canada, see Reiter and Swan (eds.), *Studies in Contract Law*, 1980.

31 Atiyah, "Rise and Fall of Freedom of Contract, 1979; see also Smith, "*The Law of Contract - Dead or Alive?*" (1979) *Law Teacher*, 73.

a general note, it must be said that Gilmore's book, the title of which has been described as "reminiscent of a magazine cover of the period which proclaimed that God was dead",³² was a little premature. Smith, contrary to Gilmore, argues that contract law, far from being dead, is alive and growing.³³ Gilmore's book has also been described by some as "good literature, bad history, and questionable theory"³⁴ while others have pointed out that his picture of the development and decline of classical law is in many respects overdrawn or just wrong.³⁵

One must concede though that there is some truth in the "*Death of Contract*" thesis which challenges the distinctiveness of contract law. And support is not lacking for Gilmore's argument that contract ought not to continue as a separate legal category but should instead be absorbed, or reabsorbed, into tort or a single law of obligations encompassing contracts, torts and restitution.³⁶

Without delving into the respective merits of the above arguments, the simple fact is that contract is still alive and surviving in Cameroon, even if it is not entirely well. It is difficult to say whether the arrangement in Civil Law Cameroon whereby contract effectively falls under the law of obligations is satisfactory to Gilmore and his supporters. Perhaps the problem would be that even under such an arrangement, contract is still sufficiently distinct. What can be said for certain is that the classical

32 Coote, "*The Essence of Contract*" (1988) 1 J. C. L. 91.

33 Smith, *Op. cit.*, note 31, 74.

34 Feinman, "*The Significance of Contract Theory*" (1990) 58 Cinc. L. R. 1291.

35 See e.g, Gordon, "*Book Review*" (1974) Wis.L.R. 1216; Milhollin, "*More on the Death of Contract*" (Book Review) (1974) 24 Cath.U.L.R. 29, 42-60; Speidel, "*On the Reported Death and Continued Vitality of Contract*" (Book Review) (1975) 27 Stan.L.R.1161, 1177-1182.

36 Fuller and Perdue, in their famous article "*The Reliance Interest in Contract Damages*", (1936) 46 Yale L.J. 419, had earlier argued that the boundaries of contract and tort should be erased. Atiyah, "*Contracts, Promises and the Law of Obligation*" (1978) 94 L.Q.R. 193 and *The Rise and Fall of Freedom of Contract*, (1979), is also in favour of it.

or neo-classical law that seems to have bothered Gilmore so much is very much the staple in Cameroon, especially in the common law jurisdiction. Contract law, therefore, does not only maintain its distinctiveness in Cameroon but has some important role to perform.

The law of contract, in common with other branches of the law, is or should be concerned with the identification and protection of legitimate ~~expectations~~. There is nothing new in this concept. As early as 1763 it was asserted by Adam Smith that a contractual obligation "arose intirely (sic) from the expectation and dependence that was excited in him to whom the contract was made".³⁷ But unlike tort law, for instance, contract law does not proscribe behaviour but requires the court to levy sanctions if a party breaks an agreement. Few people will be prepared to buy goods unless they are sure that their ownership is going to be exclusive. So where property and tort law guarantee rights of peaceful possession, so too does contract law purport to ensure that promises, once made will be honoured.

Contract law is also important in that it enables individuals to engage in their own "private legislation". Subject to a limited number of restrictions, the law of contract can be said to have delegated to individual citizens a form of legislative authority. This is vital because people are always involved in contracts in their every day lives. Josserand's observation that "*Nous vivions de plus en plus contractuellement*",³⁸ is even truer today than when it was made over half a century ago.

From an international perspective, the law of contract is of paramount importance to international trade. It performs the role of promoting and providing confidence in the foreign investor. It also provides the basic legal framework within which most commercial and business dealings have to take place. Foreign investors will hardly trust their funds to a country whose legal system does not have some form of developed contract law that can guarantee some stability of expectation in the business deals they become involved in. A contract law that is hard to ascertain, impossible to predict and generally in disorder is hardly likely to inspire investors to trust their

37 Adam Smith, *Lectures on Jurisprudence*, 1978 ed., p. 92.

38 Josserand, "*Aperçu Général des Tendances Actuelles de la Theorie des Contrats*" 1937 R.T.D.C., 1.

funds (whose security usually depends on the promised word) to a country whose contract law is in such a sorry state.

Reverting to Cameroon, one important consideration for the choice of contract as the theme for this study is to test the widely held assumption that the law of contract as applied in Cameroon is the same as in England (for Anglophone Cameroon) and France (for Francophone Cameroon). That assumption is certainly not without foundation, yet to suggest that all that one has to do in order to determine the Cameroonian position on any given contractual question is merely to refer to the handy and available English or French legal literature on the issue in question, is too simplistic, over presumptuous, and may be misleading. This is because for that to be possible, two basic conditions would have to be satisfied, namely: that the received laws in Cameroon are exactly the same as the current English and French laws on the subject and secondly, that the received laws develop contemporaneously with the present day English and French law, i.e. their rules are applied by the Cameroonian courts in the same manner as the courts in England and France.

The first condition is not entirely present in Cameroon. It will be shown in chapter two that the application of the received English law in Cameroon, is limited, at least in principle, to the common law, doctrines of equity and statutes of general application that were in force in England on or before 1st January, 1900 while the application of French law is limited to a mixture of the law that was in force in French Equatorial Africa and France on or before 1st January, 1924. As for the second condition, while it is true that the common and civil law in Cameroon have tried to pursue a path identical to that of England and France respectively, that congruence must have diminished in recent times. This is due to the fact that several developments in contract law that have taken place in England and France have not been followed or adopted in Cameroon. In England, for instance, there have been several legislative intervention such as the Law Reform (Contributory Negligence) Act 1945, the Misrepresentation Act (1967), the Unfair Contracts Term Act (1977) and the Sale of Goods Act (1979), the Sale and Supply of Goods Act (1994) to name only a few. In France, *Loi du 10 Janvier 1978* (on consumer credit) and *Loi du 13 Juillet 1979* (on credit concerning real property) are just two examples. In Cameroon, on the other hand, contract law has experienced very little legislative activity ever since

independence.

4. *THE SCOPE OF THE THESIS.*

The curious dearth in legal writing in Cameroon tends to give a particularly pioneering tinge to any effort to collate and analyze the law on any subject. Having opted for contract law, I had to decide whether to concentrate on some specific aspect of the subject or on the general principles. I decided against the former possibility for two reasons. First, I suspected (a suspicion that was confirmed by fieldwork results) at the time that I might not be able to find sufficient Cameroonian material on any one aspect to adequately develop a Ph.D. thesis. So, simple logistics decreed in favour of general principles. Secondly, the need for some constituted framework of contract law in Cameroon in the light of what has already been said so far, cannot be over-emphasised. I found that challenge all too inviting. The thesis focuses thus on general principles of contract law and deals mainly with what is known in common law as simple contracts³⁹ - contracts made either by word of mouth or by writing.

Because the work has to be kept within prescribed and manageable limits, selective emphasis has been vital even though difficult. This difficulty is compounded by the fact that this work does have a comparative dimension to it. Since English and French laws are involved, it is impossible to undertake this study without reflecting on, and making some comparisons between these systems. There is always a certain risk in choosing topics for this kind of research with a comparative dimension, since to make a rational choice, it would be necessary to know the result of the comparison before undertaking it. In the very nature of things the choice can scarcely ever be made in full knowledge of all the relevant facts.

These problems notwithstanding, I settled for formation (offer and acceptance, cause and consideration), defective contracts and remedies. These topics broadly represent areas where basic liability in contract is determined and the relief available to an injured party. Any choice of topics will have its critics as well as its supporters

³⁹ This is used conveniently in this context to embrace similar contracts in civil law. See chapter 4.

and it may indeed be subjective. For that reason, I must stress that those topics not covered are not necessarily less important either from the point of view of practicality or for the purpose of comparisons between the two systems. But to consider all the fundamental areas of contract law is to sacrifice analysis for generalities. This is not to suggest that of the chosen topics, the analysis is exhaustive. Each individual topic, it will be observed, is dealt with only in so far as it illuminates the main theme. Hence the treatment of some parts is less detailed than the treatment of others. Any unevenness of treatment, therefore, is deliberate.

Finally, a consideration of the general principles of substantive contract law alone would still leave certain questions on the nature and status of contract law in Cameroon unanswered. To fill in any such gaps, I have added for good measure, a consideration of other topics such as customary contract law, the nature and structure of contracts and internal conflict of laws in contractual obligations.

5. METHODOLOGY.

In this study, English law, French law and to some extent, customary law are involved. It will become obvious early on that customary law does not have pride of place in the overall contract structure. For that reason, all important issues relating to customary contract law are discussed in detail in chapter two so as to make way for a consideration of the imported English common law and French civil law of contract, which are the main concern of this thesis.

Because contract law in Cameroon is still inextricably linked to the English and French civil law, it will be futile to attempt any study of Cameroonian contract law without regard to English and French contract law. I find it appropriate, therefore, to check on the development of contract law in Common Law Cameroon vis-à-vis English contract law, and do likewise for Civil Law Cameroon and French law.

As far the use of case-law, I have decided against relying exclusively on decisions of Cameroonian courts. Although I am primarily concerned with the working of contract law in Cameroon, I cannot overlook the fact that Cameroonian courts continue to cite and accord respect to decisions of English and French courts.

The selection of cases by any researcher is likely to be idiosyncratic. Mine is no

exception even though I was handicapped in my ability to choose from local cases because of the thin judicial dicta in some areas. Some of the cases I have discussed, it will be noticed, are noteworthy, not because they are examples of "clear law" but because they are aberrant or represent the triumph of doctrine over practical necessity. But in my opinion I have tried to provide the best blend of available Cameroonian, English, and French cases to illustrate and explain the law of contract in Cameroon.

I have also made references to cases and academic writings from other common law (e.g. the United States, Australia, Ghana, and Nigeria) and other civil law (e.g. civil law Canada and the state of Louisiana (U.S.A)) jurisdictions. This certainly is not for the purpose of providing any exhaustive statement of their laws, but, instead for the purpose of comparisons. Although I cite academic works freely, I have avoided to engage in extensive theoretical discussion. In avoiding that temptation, I have heeded the advice of no less a figure in the law of contract than Farnsworth, who has lamented that too many scholars spend far too much time creating "elaborate theories" about the law of contract.⁴⁰ Students of contract law would agree that Farnsworth is hardly the person to talk in this context. Nevertheless, his point is indeed important, particular in the case of Cameroon where the (received) law of contract is still in its infancy. So, this thesis strives, in a modest manner that recalls the American realists of the thirties, as manifested in the writings of Karl Llewelyn and Lon Fuller, to pay more attention in describing what Cameroonian courts actually do, rather than to analyze the doctrines which they offer as justification for their decisions. This does not mean that doctrinal discussions are barred. In fact, while the present analysis may not itself suggest any elaborate theories, it may say, where necessary, that such a theory should exist in connection with such judicially imposed compromise.

I have for the purpose of this study, adopted the unitary theory of contract. This theory holds that there exists a law of contract rather than a law of contracts. This is very much the traditional common law view,⁴¹ but I shall be extending its

40 Farnsworth, "A Fable and a Quiz on Contracts" (1987) 37 J. Leg. Educ. 208.

41 See, e.g. Treitel, *An Outline of the Law of Contract* (2nd ed., 1980), pp. 1-2. Contrast Gilmore, *op. cit.*, pp.7-8.

application to the civil law aspects of this work. I do so because even though particular types of contract such as sale of goods, charterparties and so on attract particular rules, the courts, whether at common or civil law, still proceed on the basis that it is still legitimate to state general contractual principles which are, *prima facie*, applicable to all contracts. As Roskill LJ puts it,⁴²

"It is desirable that the same legal principles should apply to law of contract as a whole and that different principles should not apply to different branches of that law."

That approach is also endorsed by academics. Smith has said,⁴³

"What distinguishes contract as a subject of study from say, tort or criminal law, is the generality of the principles. It has principles which really *are* principles and not mere rules. We find the same principles governing the hiring of a prima donna as the hiring of an oil tanker; promises designed to encourage others to use a carbolic smoke ball may be same in legal effect as promises made to a stevedore to induce him to load or unload goods from a ship".

Since this study is mainly about general principles, it accordingly proceeds from the basis that it is possible to state general rules of *prima facie* application to all types of contracts. There is thus no treatment for particular types of contracts.

I have thus far set out what I want to do, how I intend to do it, and what I aim to achieve. Whether all that is at all doable, is another question. What is not problematical, is the need for getting to work on an attempt to do it.

42 *Cehave NV v. Bremer Handelgesellschaft MbH* [1976] Q.B. 44 at 71.

43 Smith, *Op. cit.*, note , 74.



CHAPTER TWO.

A CAMEROONIAN CONTRACT LAW?

In this chapter, I propose to determine the respective places of customary law and the received laws in the overall contract law of Cameroon. I shall be considering, amongst other things, the extent to which each of them can be treated as a source of contract law, the extent to which they have influenced each other and the limitations, if any, to their respective application.

The question may be asked: Which law governs contractual obligations in Cameroon? When I put this question to Cameroonian lawyers (judges, practitioners and scholars), they considered it somewhat trite and vexatious. The answers I got were simple and straightforward. To the Anglophones, it is the (English) Common Law; to the Francophones, it is the (French) Civil Law. These answers may, by now, have achieved respectability, and even triteness, yet it is contended that the above question should not be answered in such a simple proposition. To do so would imply either that Cameroonian indigenous law was devoid of any notion of contract before the arrival of the British and the French, or that any such notion, if it existed, was completely suppressed and replaced with rules of English and French contract law upon their arrival.

The position is therefore slightly more complicated than it appears to be. If one were to accept the answers given above as correct, then, the country can be divided into two: the English speaking part, where the English common law of contract operates and the French speaking part, where the French civil law of contract operates. The problem with those answers though, is that they are not complete. Any comprehensive answer, it is suggested, must include customary contract law. To that

end, I prefer to divide the subject of contract into two: unwritten contract law¹ and written contract law. The former refers to indigenous or customary law while the latter refers to what I shall call modern (i.e. the imported English and French) contract law. Part one of this chapter deals with customary law and part two deals with the received English and French laws.

1. CUSTOMARY CONTRACT LAW.

(1). The Existence and Types of Customary Contracts.

I will take as a convenient starting point the once celebrated controversy as to whether African customary law knows any distinction between crimes and civil wrongs and whether there is any classification of civil wrongs into contracts and torts.² Influential early writers such as Maine favoured the view that contract was only marginally known to ancient or primitive law:

"...the individual in primitive societies creates for himself few or no rights and few or no duties. The rules which he obeys are derived from the station into which he is born and next from the imperative commands addressed to him by the chief of the household of which he forms part. Such a system leaves a very small room for contracts. The members of the same family are wholly incapable of contracting with each other and the family is entitled to disregard the engagements by which one of its subordinate members has attempted to bind it."³

¹ A major characteristic of African customary law is its unwritten nature. See Allott, *Essays on African Law*, 1960, p. 62; French commentators on African law refer to its unwritten character as "*l'oralité juridique*". See e.g., E. Le Roy, "*Justice Africaine et oralité juridique*", I.F.A.N., no. 3, Juillet 1974, p. 566, cited in Anyangwe: *The Cameroonian Judicial System*, 1987, p.9.

² Elias: *The Nature of African Customary Law*. 1962, p. 10.

³ Maine: *Ancient Law*, (10th. ed.) 276-277; See also, Godinec: *Le Droit Africain*, tome. 1, 1968, p. 12.

There is little doubt that contracts or legally binding agreements played only a small part in the early history not only of Africa but of all known peoples. The development of contract is largely an incident of commercial and industrial enterprises that involve a greater anticipation of the future than is necessary in a simpler or more primitive economy. In traditional African societies, therefore, the solidarity of relatively self-sufficient family groups and the fear of departing from accustomed ways limited individual initiative as well as the scope and importance of contracts. Yet it must not be assumed that contracts were, and are still, entirely unknown to these societies. Maine's famous dictum that the progress of law has been from status to contract has generally been understood as stating not only a historical generalization but also a judgement of sound policy - that a legal system wherein rights and duties are determined by the agreement of the parties is preferred to a system wherein they are determined by "status."⁴ This movement can be said to be taking place now in traditional African societies in general and in Cameroon in particular, where social and economic changes have transformed contract into a dynamic institution. The institutions of communal ownership and family ownership are dying⁵ slowly but steadily and the individual is emerging as a new unit of economic activity the spheres of which have widened beyond peasant agriculture. As far back as 1959, Kanga was able to confirm, in his study of the Bamileke tribe of the Western Province of Cameroon, that the notion of individual responsibility was firmly rooted in their customary law.⁶ Today, it is all too clear that the individualistic ethic (and its

⁴ Cohen, *"The Basis of Contract"* (1933) Harv.L.R. 553.

⁵ See the brilliant essay by Reisman, *"The Individual Under African Law in Comprehensive Context"* In: Takirambudde (ed): **The Individual under African Law. Proceedings of the First All Africa Law Conference.** October 11- 16, 1981. Swaziland, 1988, pp. 8-27.

⁶ Kanga: **Le Droit Coutumier Bamileke au Contact de Droit Europeens.** 1959, p. 145.

shadow, self-reliance) has gained much ground throughout Cameroon.

There is now a plethora of surveys that provide overwhelming evidence in favour of the view that there has always been, and there still is, what one can rightly term an African customary law of contract. Schapera, for instance, has succeeded in showing, as a result of the investigation of case material, that a generalised set of rules exist separately in Tswana customary law⁷ while Elias has not only rejected strongly the suggestion that there is no general contract law under customary law, basing a good deal of his argument on marriage and its related contracts,⁸ but adds that customary law also recognises specific contracts such as contracts of agistment, co-operative labour contracts, personal service contracts and contracts of pledge and pawn.⁹ Further still, contracts such as cattle herding, house building, medical treatment, labour contracts, sale of cattle and pledges and pawn have variously been identified in Iteso customary law¹⁰ and South African customary law.¹¹ The use of examples from various parts of Africa is deliberate. It is to show the remarkable similarity of the various types of contracts recognised by groups of people in Africa.

The best documented evidence on this subject in Cameroon remains that provided by Kanga.¹² He does not only identify some particular contracts recognised by the Bamileke customary law such as sales, pledge and pawn and agricultural pacts. He

⁷ Schapera, "*Contracts in Tswana Customary Law*" (1965) 9 J.A.L., 142-153.

⁸ Elias, *op.cit.*, note 2, pp. 144-148 and 152-155.

⁹ Elias: *Grounwork of Nigerian Law*, 1954, pp. 236-243.

¹⁰ Lawrence: *The Iteso*. 1957, pp. 234-240.

¹¹ Seymour: *Native law in South Africa*. 1960, pp. 218-223.

¹² Kanga: *Op.cit.*, note 6; See also Monie, J.N, "*The Development of Laws and Constitution of Cameroon*." Ph.D Thesis, University of London, 1970.

goes further to determine the four conditions that are necessary for the formation and validity of such contracts, namely:- that there must be an object, the parties and their representatives must consent, the parties and their representatives must have capacity and finally, that the contract must not be contrary to any custom.

Although he does not discuss how these conditions are interpreted, it should perhaps be said that they are not necessarily interpreted in the same manner as would be the case in England or France. The capacity to contract under customary law for example, may not be determined by age but by status, such as marriage or membership of some secret society. Also, what may contradict English or French custom or law may not contravene Cameroonian custom. A good example is polygamous marriage. While that will certainly be contrary to English and French law (in France it will be void for an illicit cause) it is perfectly valid by Cameroonian custom once the parties have so elected.

As for consent, it has been suggested that it does not play the same role in African law as in European law.¹³ It may well be so in some cases¹⁴ but the writer goes further to assert that,

"in certain contracts the validity of the obligation is not affected even if the consent is vitiated... A sale is complete once it has been effected with the seller's consent. It does not matter if his consent was vitiated by fraud since in the world of dealings, everyone is trying to make a good bargain."

¹³ Keba M'Baye, *"The African Conception of Law"* In: **International Encyclopaedia of Comparative Law**, Vol. 11, chap. 1, p. 146.

¹⁴ This may be true in the contract of marriage to the extent that the consent of both the bride and groom may not be crucial. Even so, the families of both parties must consent. This can be explained by the fact that marriage as conceived in the majority of traditional African custom is a relationship between families to be concluded between families, not just the immediate individuals concerned. It must be said that this practice is gradually dying, largely as a result of the progressive westernisation of the African youth. The author himself cites some examples in African criminal law.

It is respectfully submitted that this assertion in no way represents the true position of African customary law. It should not go unnoticed that the writer conspicuously fails to cite a single example to support his assertion, perhaps because he could not find any. Customary law will definitely not sanction a contract of sale in which there is clear evidence that the seller's consent was vitiated by fraud. Support for this view, if any was needed, can be sought in Monie's finding that customary law does not recognise the maxim *caveat emptor*.¹⁵ It would appear from that finding that this jural postulate of a social philosophy of rugged individualism has not found favour in African customary law. If, therefore, the seller's consent is vitiated by fraud, as where he sells a cow which he knows to be suffering from a serious illness, the contract will not be allowed to stand.

At this point, it may be relevant to briefly discuss a few contracts that are easily identified under customary law.¹⁶ The contract of sale is by far the most common type of contract under customary law. Articles such as knives, axes, swords, shields, rugs, mats, baskets, pipes, grindstones, canoes, ornaments, magical objects, various forms of clothing, food and wine and many more are not only transferred privately between individuals but are offered competitively in markets. In the past there was evidently no money or other medium of exchange; the mode of trade was direct exchange or barter. It does not follow, of course, that the concepts of value or pricing were missing. Quantity, superior quality, distance from source, scarcity of an item etc., were used to determine the respective values of the items to be exchanged. The introduction of money however has brought trade by barter almost to an end. It is now practised only in the most remote parts of the country. Sale, especially in the market place is now conducted on a monetary basis. The seller and the buyer do a

¹⁵ Monie, *Op.cit.* note 12, p. 513.

¹⁶ My observations and conclusions will be drawn partly from my experiences and partly from conversations with many very elderly people in various parts of Cameroon. The interesting thing was that these elderly people always painted a similar picture wherever I went.

lot of haggling until a price is agreed. Some important contracts such as contracts for the sale of livestock (which forms the subject matter of many contracts in cattle rearing communities), even if not done in the market place, must nevertheless be concluded in the presence of witnesses.

The payment of the price and the passing of property to the buyer does not completely absolve the seller from all liability. It has already been mentioned above that customary law does not recognise the maxim *caveat emptor*. Thus, if before the expiry of a reasonable time after the sale, the animal is diagnosed to be suffering from a serious disease that could not be detected at the time of sale, or it is discovered that the seller had stolen it from someone else, the seller will have to refund the purchase price or provide another animal. This is when the witnesses become important as they will be called upon to testify.

The sale of land or an interest in land is probably the most important contract under customary law. In the past, land was never sold as it belonged to the whole community. The chief or king held all land in trust. These days land is being sold even if not frequently. The sale of land must be approved by elders of the seller's lineage for it to be valid. It must be concluded in the presence of witnesses and it is usually accompanied by some element of feasting.

Not merely goods, but services too are traded. One major service contract is the contract of agistment. This type of contract is very important in the cattle rearing communities. It is a contract whereby the owner of cattle contracts them to someone else for custody and rearing. The consideration for this may either be a share of the resulting progeny or money. Other service contracts include co-operative labour contracts or agricultural pacts, building construction and medicinal treatment contracts.

It is not necessary for the present purpose to continue to enumerate and discuss the other contracts known to customary law. I believe that what has so far discussed establishes the existence, past and present, of a body of customary contract law, in the Cameroonian (and African) traditional society. This is not to say difficulties peculiar to this kind of society do not arise. Customary contract law may be different in legal character and form from the received English and French laws, it may desperately lack

some systematic formulation, yet its existence is not in doubt and has, in fact, always received some official recognition during and after the colonial era.

(2). The Approbation of Customary Law.

Before the arrival of the Germans and later the English and French, every autonomous indigenous tribe in Cameroon had its own tribal law or legal system. Some of these were customary in character i.e. they drew their rules from habitual practices, while others were religious in character, for example in the north of Cameroon where the Islamic religion had been firmly implanted. There could not have been any great legal variation as many of the tribal laws were either uniform or closely related to the macro-ethnic group which shared similar laws, even as between tribes having different languages, history and culture. This is not to suggest, however, that there were no differences at all.

When Britain and France took over Cameroon, they were content to recognise and allow the natives to continue with their natural system of laws and legal institutions whilst they themselves (and a few "Europeanised Cameroonians") were subjected to their own metropolitan laws or a variant of it which they introduced into Cameroon.

In some cases, notably in the French territories, statutory recognition of native law could be found in the enactments relating to the the jurisdiction of courts. Thus in respect of these territories, Rolland and Lampue have stated that:

*"ce sont les décrets relatifs à l'organisation judiciaire qui impliquent le maintien du droit traditionnel, en établissant des tribunaux spéciaux distincts des tribunaux de droit Français. Quequefois d'ailleurs ils disposent expressément que le tribunaux en question juge suivant les coutumes."*¹⁷

The statute in question in French Cameroon is the **Decree of 31 July 1927** (later to be replaced by the **Decree of 26 July 1944**) that set up indigenous courts. In British Cameroons, Great Britain did not only recognise customary law but used customary

¹⁷ Rolland, et Lampue: **Précis de Droit de Pays d'Outre-mer**. 1949, p. 290.

courts as official instruments of their colonial rule.¹⁸ It must be said that customary courts still operate today throughout the country even though the 1972 Judicial Organisation Ordinance declared that they were only to be maintained temporarily after that date. They apply only the native law and custom prevailing in the area in which they are located and are staffed by non professional locals. Appeals from customary courts now lie to the Courts of Appeal.

The recognition of customary law, however, was never going to halt the ever increasing influence of the received laws. Political, economic, and social changes brought about much greater interaction and contacts between the natives and the Europeans. This led to an unavoidable clash of cultures, a conflict which unfortunately was to spark the gradual demise of customary law. As a result of this conflict, the colonial regimes used their political power to cut down the extent to which customary law applied in many ways.

Criminal law was first to be affected. The criminal jurisdiction of customary courts was drastically reduced, leaving them to deal with only minor criminal matters. Serious matters such as treason, sedition, homicide, rape, were removed from their jurisdiction.¹⁹ The post independent legislator continued where the colonial legislator ended, so that even the limited criminal jurisdiction has now been finally taken away by section 26 of the Judicial Organisation Ordinance 1972, which completely suppressed the criminal jurisdiction of customary courts. The civil jurisdiction of these courts was also limited to areas of life where few direct conflicts would arise between the imported and indigenous laws, precisely to that part of native law which relates to marriage and family, property and succession, and in other spheres which were most closely bound up with the village social order. Understandably, they were given no jurisdiction in complex commercial matters like banking, which are foreign to customary law by their very nature.

¹⁸ See the Customary Courts Ordinance, Cap 142 of Laws of the Federation of Nigeria, 1948.

¹⁹ For British Cameroons, see Customary Courts Ordinance, *op. cit.*, note 18; For French Cameroons, see Decree of 31st July, 1927.

One may thus conclude that the recognition of customary law by the colonial regimes was half-hearted and smacked of tokenism. Throughout the colonial era, customary law was not only restricted in its application, but the colonial regimes increasingly imposed their own systems and notions of justice on Cameroon. This process, which has been rightly described as "*acculturation judiciaire*",²⁰ led to an irreversible transformation of indigenous laws and judicial institutions by the end of the colonial era. Sadly, the post independent legislator has done nothing to redress this imbalance.

²⁰ Le Roy, *Op. cit.*, note 1; Godinec, *Op. cit.*, note 3, p. 20, defines *aculturation* as the imposition of a European system of education and values of civilization over African ones.

(3). The Criteria of the Validity of Customary Law in Non-Native Courts.

By non-native courts, I am referring to all the modern courts that apply the common law and the civil law as their primary or basic law. They include for the present purpose, the Magistrates' Courts, the High Courts, the Courts of Appeal and the Supreme Court. These courts are also free to apply customary law in certain circumstances. It is intended here to determine those circumstances under which a rule of customary law in general, and of contract in particular, can be successfully pleaded before these courts. In other words, what is the criteria of the validity for customary law in non-native courts? It is worth pointing out that in both Anglophone and Francophone Cameroon, statutory and judicial criteria have been laid down for the validity of customary law.

In the Anglophone part, these are to be found in the Southern Cameroons High Court Law, 1955. Section 27(1) of the said law directs the high court to

"observe and enforce the observance of customary law which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication, with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such law or custom".

Section 27(2) provides that:

Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.

And section 27(3) enacts:

No party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from express contract or the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligation with such transaction should be regulated exclusively by English law or that such transactions are

transactions unknown to native law and custom.

The use of the disjunctive word 'nor' in section 27(1), it is submitted, suggests that the tests are alternative, not cumulative. In other words, under the above provision, it is enough for the purpose of its invalidation that a rule of customary law is found to be repugnant to "natural justice, equity and good conscience". Where such a finding is not possible, the rule may nevertheless be invalidated if it is found to be "incompatible" whether directly or otherwise, with any law for the time being in force.

In Francophone Cameroon, the criterion laid down for the validity of any customary law rule in the non-native courts is that it must not be contrary to public order, good morality, or incompatible with written law. Any rule of customary law that seemed to be incompatible with notions of French civilisation, "*l'ordre publique ou bonne meours*" or "*manifestement contraire aux concepts et principes moderne*" was struck down.²¹ The use of the concept of *ordre public* by non-native courts to deny the enforcement of certain customary rules²² remains a source of controversy in Cameroon.²³ One Cameroonian commentator has been moved to ask, with enjoyable acerbity, "*De quel ordre public invoquaient ces décisions pour repousser les coutumes: métropolitain ou local ?*"²⁴ (on whose idea of *ordre public* (western or African) is the exclusion of customary law is based). No marks for guessing that he is pouring scorn on the idea of using western concepts of *ordre public* in an African setting.

²¹ Nguini, "*Droit Modern et Droit Traditionel*" (1973) 83 Pennant, 9; Melone, "*Le Code Civil Contre la Coutume. La fin de la Suprematie*" (1972) no. 12 Rev. Cam. Dr., 1.

²² For a catalogue of some instances, see Enonchong, "*Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon*" (1993) 5 RADIC, pp. 503-524.

²³ See generally Melone, *Op. cit.*, note 21.

²⁴ See for example, Nkouendjin, "*Le Role de la JurJurisprudence dans les Nouveaux Etats D'Afrique Francophones*" (1973) 83 Pennant, 11, 15.

(4). Judicial Attitudes.

It has been stated above that the application of native law in the non-native courts is usually limited by what may conveniently be called the 'repugnancy and incompatibility clause' i.e. a clause to the effect that it shall be applicable only in so far as it is not inconsistent with certain prescribed standards. The language used to describe these standards varies considerably as between Anglophone and Francophone Cameroon, and though in principle, the differences may not always be unimportant - the conception of *l'ordre public* (the term used in Francophone Cameroon) would appear to admit of a wider discretion than the words "not repugnant to natural justice" (which constitutes the criterion in Anglophone Cameroon). It should be said nevertheless that most of the terms seem to be equally general and abstract and therefore lead to no real differences in their practical application. A consideration of the practical effect of these repugnancy or incompatible clauses, as exemplified in judicial proceedings in both the common and civil law jurisdictions in Cameroon will confirm that assertion.

The case of *Etone v Ngeh*²⁵ decided in Anglophone Cameroon, provides a very interesting example of the application of the repugnancy clause. Even though it did not involve a contract, it nevertheless will throw some light on the present discussion. In that the case, the plaintiff and one Paulina Mekong had been married according to native law and custom for 10 years without issue. In 1952 she left the plaintiff and went to live with Ngeh by whom she had twin sons. Thereafter the plaintiff brought a suit in the then Kumba Native Court against Pauline for a declaration that the twins were his. It must be said that the plaintiff could not, and in fact, did not, make any pretensions to biological paternity. Rather he insisted on his "rights", basing his claim on a customary law rule to the effect that if a woman leaves her husband, A, and goes to live with B, by whom she bears children, those children will be deemed to belong

²⁵ 1962-1964 W.C.L.R. 32

to A unless B has fully refunded to A the bride price he paid to the woman's parents or relations. Since Ngeh had not fully refunded the plaintiff's bride price, the native court had little difficulty in finding for Etone. The Special Appeals Officer (the District Officer) upheld the decision but on further appeal, the West Cameroon Appeal Court took the view that the said customary law rule was repugnant to natural justice, equity and good conscience. The decision was therefore reversed and the children given to Ngeh, their natural father. In Francophone Cameroon a similar decision was arrived at in **Arret du 20 Mars 1962**²⁶ in which the Supreme Court of the then East Cameroon, ruled emphatically that the native law rule

"suivant laquelle le versement d'une dot en vue d'obtenir une femme en mariage suffit, en tout état de cause, à faire attribuer la paternité des enfants de cette femme à celui qui à versé la dot est manifestement contraire aux principes ... ordre public. Paternité naturelle ne peut resulter que de l'existence de liens du sang... à l'exclusion de tout motif fondé sur la dot".

On the evidence of the few contract cases I have found involving customary law, the non-native courts have shown a greater inclination to applying rules of English and French contract law, even where it would have been more appropriate to have recourse to rules of customary law. The decision of the Bamenda Court of Appeal in **Ronate Tapong v. Joshua Mobit**²⁷ illustrates by far the most blatant disregard for customary law. The case involved the breach of an agreement to marry. The respondent, was the senior brother to one Jerome Mobit and successor to their deceased father. He therefore stood *in loco parentis* to Jerome. Sometime in 1969, he approached the father of Ronate, the appellant and proposed a marriage between his junior brother, Jerome (who at the time was living and working in another town) and Ronate. When all the necessary arrangements had been put in place, Jerome went back home in November 1969 and an agreement to marry was concluded. The families of both parties, and no doubt the parties themselves, contemplated ceremonies pursuant to native laws and custom. As required by native law and custom, the respondent on

²⁶ 1962 Pennant, 576.

²⁷ Suit No. BCA/31/74 (Bamenda, unreported).

behalf of his junior brother paid a dowry of about 95.000 francs plus other gifts to the family of the appellant. In 1970, the appellant wrote to the family of the respondent that she was breaking off the engagement and in the same letter undertook to pay back the dowry and other sums of money which had been paid to her family. After paying about a third of that, she discontinued payment, whereupon the respondent brought an action for the full refund of the bride price. The trial court (the Bamenda Court of First Instance) found for the respondent. Ronate appealed, *inter alia*, on the grounds that (i) the trial Magistrate erred in law by enforcing a purported Native Law and Custom which was not proven before the court and (ii) that the trial Magistrate erred in law in giving judgement on principles repugnant and contrary to the laws governing contracts.

The Court of Appeal, while not disputing the fact that this was a purely customary law arrangement, chose to adjudicate upon the matter by applying the English contract law concepts of consideration and privity. On that basis the court took the view that the consideration for the appellant's promise to marry Jerome was his own promise to marry her. In other words, the consideration was executory and the contract became binding as soon as the promises had been exchanged. Setting aside the decision of the trial court, the Court of Appeal opined that any action to enforce the contract should have been brought by Jerome and not Joshua, his elder brother cum father, because even though he had paid the dowry and conducted the negotiations which led to the contract, he was a stranger to the consideration and therefore could not sue on the contract.

The result reached by the Court of Appeal, with due respect, is unacceptable. Firstly, one must take issue with the courts's outrageous statement that "it was irrelevant that the two families contemplated ceremonies pursuant to native laws and custom". This statement, if nothing else, only epitomises the contempt with which the courts treat customary law. Perhaps the Court of Appeal needed reminding that section 27 (1) of the Southern Cameroons High Court Law 1955 requires non-native courts to observe and enforce the observance of any native law and custom which is neither repugnant to natural justice nor incompatible with any other law. Under native

law and custom, marriage is so important that it is regarded as a transaction between two kin-groups (i.e. the families of both parties), not just individuals. This can be contrasted with the modern or western conception of marriage as a voluntary union between individuals animated by personal romantic attachments. The traditional African perception of marriage as an affair between families all too well known, even to western observers.²⁸ One would therefore prefer not to think that the Court of Appeal by any stretch of imagination considered this fact to be repugnant to natural justice, neither can it be said that it contravenes any known law in Cameroon. If that is not the case (and it should not be the case) why, then, did the court feel confident to declare that the parties' contemplation of native law and custom was of no moment.

Secondly, the appellant's argument that the trial court enforced a purported native law and custom not proven before the court is untenable. This is because the customary law rule that demands the return or repayment of the dowry in the event of a breakdown of a prospective marriage, is so trite and notorious as to dispense with the need to prove it in a court of law. For support of this assertion, one needs look no further than Rubin's²⁹ comprehensive survey of the matrimonial law among the Bali tribe of Cameroon. In paragraph 23, he states with regard to marriage negotiations and consideration, that "the proper persons to conduct the negotiations for the payment of marriage consideration are (a) in the case of a first marriage by an unmarried boy, his father or head of his family". On the source of marriage consideration, he states in paragraph 86 that: "Traditionally, the father of the bridegroom (or head of his family) was expected to provide the marriage consideration", and on the return of marriage consideration, he concludes in paragraph 99 that "Where no marriage occurs, all obligations arising in terms of an agreement on marriage consideration, made in respect to a prospective marriage are terminated, and any payments made pursuant to such agreement must be refunded". It should be

²⁸ Godinec, *Op. cit.*, note 3, p. 12.

²⁹ Rubin, "Matrimonial Law Among The Bali of West Cameroon" (1970) 14 no.2, J.A.L. 66

noted that although Rubin's finding relate only to the Bali tribe in Anglophone Cameroon, similar conclusions will be reached in most parts of the country.

This light-hearted, perhaps apocryphal, yet poignant story recently reported in the Guardian Newspaper³⁰ demonstrates that the customary law rule in favour of the refund of the dowry after the breakdown of marriage or an engagement is also well established in Francophone Cameroon.³¹ The story goes that a Cameroonian man, Michel Fotso, who was told by his wife's relatives that she died in childbirth six years ago accused her of theft after seeing her in a bar with a new husband. He complained that he had paid 4 pigs, a little rum, 100 litres of red wine, five machetes and a bicycle to her.

Whatever might have been the reasons for such a shameless lie on the part of the wife and her relatives, it is submitted that it could not have been totally unconnected with the need to avoid refunding the bride price, since the death of the wife is most likely to dispense with the need for any refund of the bride price. Such a devious attempt to avoid the repayment of the bride price by the wife and her family must be taken as an acquiescence in the native law rule that the bride price or dowry must be refunded on the breakdown of marriage, especially where such breakdown is at the instance of the bride.

In the light of the above, it would have to be said that the Court of Appeal was wrong to hold that the parties' contemplation of native law and custom in the *Ronate Tapong* case did not matter.³² The court was equally wrong to exclude the respondent from the consideration even though it was never contested that he actually paid the bride price. It is thus submitted that the problem in this case does not lend itself to a solution based on rules of English contract law. Rather, the problem is

³⁰ The (London) Guardian, Tuesday Sept. 27, 1994, p. 10.

³¹ It is presumed from the name of the man involved that the parties are Francophone Cameroonians.

³² The decision has also been the subject of a critical note. See Zama, "*Can a third party to an agreement to marry under Customary law claim damages for breach of contract of an agreement to marry ?*" (1991) 7 Jur. Info, pp. 35-37.

about a customary marriage arrangement that collapsed because the bride pulled out. Any analysis in terms of English contract law, therefore, is simply a device to get around the issue of native law and custom. The neat way to have dealt with the problem would have been to apply native law and custom (as the trial court did) according to which the respondent would have been privy to the marriage agreement and perfectly entitled to recover.

In another case, *Mallam Bello v. Mallam Ngoni*,³³ a contractual dispute arose over cattle. Despite the fact that both parties were natives and had actually taken the matter to the customary (Alkali) court in the first instance, the Court of Appeal again employed rules of the English law of contract and tort such as negligence, duty of care, consideration and frustration. It does not matter that they arrived at the same conclusions that the customary courts would have reached. The point is that the courts should apply native law and custom whenever it is clear that that was the parties contemplated when they concluded their contract.

It must not be assumed, however, that the courts always reject or ignore customary law. In *Neba Ndifor Rudolph v. Ngwa née Tata Rosemary*,³⁴ the Ngwa family (to which both the appellant and respondent's husband belonged), decided to transfer part of the family land to the respondent's husband to enable him build a house and settle. He gladly accepted the offer and was told by the appellant that native law and custom required that he provided the family with wine and food. The respondent and her husband offered money (in lieu of the required items) to the elders of his family who then showed them the piece of land. The deal was thus concluded.

The respondent then proceeded to farm on the land and the appellant brought an action against her for destruction, conversion and breach of contract. He alleged that he and the respondent had entered into an oral agreement that she would compensate him for the crops that were on the land when she and her husband took it over. The respondent argued that according to native law and custom the contract had been

³³ Appeal No. BCA/33/85. (Bamenda, unreported).

³⁴ BCA/1/89 (Bamenda, unreported).

concluded with members of the entire family and therefore nothing was owed to the appellant. The trial court dismissed the claim and the plaintiff appealed. The Court of Appeal sought the opinion of two elders of the Bafut tribe (from which all the parties hailed) and they unanimously affirmed that in their tradition, if a child or a member of the family was given part of the family land, he was also entitled to whatever is on the land. Applying this custom, the court dismissed the appeal and upheld the decision of the trial court.

In *Ngueou v. Ndjiosseu*,³⁵ decided in Francophone Cameroon, the parties (both of the Bamileke tribe) entered into a contract whereby the appellant bought the respondent's house. The respondent then renounced the contract and refused to vacate the premises whereupon the appellant brought an action before the Yaounde Court of First Instance for breach of contract, asking that the respondent be evicted. The respondent argued that Bamileke native law and custom applied, according to which he was free to rescind the contract. The court agreed and held that the appellant could only recover what he had invested in the transaction but not the house. The Court of Appeal upheld the decision and the matter went before the Supreme Court. In the Supreme Court, the appellant argued that written law (i.e. the French civil law) and particularly, article 1134 of the Civil Code should apply to deny the respondent the right to unilaterally renounce a contract that had been freely and mutually agreed upon. The Supreme Court responded by saying that in the absence of any express provision in the contract that written law was to apply in the event of litigation the trial court and the Court of Appeal Court were correct to apply customary law. The appeal was again dismissed. The only problem with this decision is that the courts do not say (at least it is not mentioned in the judgements) how they came to be so sure about the custom that permitted the respondent to avoid the contract, yet what this case shows is that the non-native courts have the power and freedom to apply native law and custom without resorting to English or French law, if only they are willing to do so.

³⁵ C.S.C.O. 26/3/1968; [1970] Pennant, 358.

Despite the above examples in which customary law has been applied, the point must be made that on the whole, the courts have shown a greater inclination towards the received laws. They always seem more prepared to reject or ignore native law and custom than they are prepared to admit it. The courts seem to take it for granted that any matter coming before them is to be tried according to the received laws, even when it is pretty obvious that the parties had customary law in mind at the time of contracting.

Without necessarily defending the courts' attitudes to native law and custom, it must be conceded that the criteria by which the courts have determined the validity of customary law are, by their very nature, inadequate, ambiguous and unfavourable to customary law. This is hardly surprising considering that they were formulated by the colonial legislator. For example, no lawyer has been able to say with certainty what the phrases natural justice, equity, and good conscience mean. The judges (not only in Cameroon but in other parts of Africa) who use the phrases again and again have not been too keen on defining them. Osborne, C.J., was frank enough to admit it in the Nigerian case of *D.W. Lewis v Bankole*:³⁶

"I am not sure that I know what the terms natural justice and good conscience mean. They are high sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the term".

Little wonder that the courts have not been uniform in their application of these charged phrases. And, much to the dismay of those whose lives are governed by customary law, when the courts are in a quandary, they have tended to invoke these phrases to deviate from the strict application of customary law.

Again, section 27(4) of the Southern Cameroon High Court Law 1955, which still applies in English speaking Cameroon, provides that where no express rule is applicable in a matter of controversy (i.e between customary law and English law), the court shall be governed by the principles of justice, equity and good conscience. There is also a similar rule in French speaking Cameroon, to the effect that where

³⁶ 1 NLR 81, 83-84, decided on 12th Nov., 1908.

there is no express customary law provision on a subject, written law (i.e French civil law) should be applied. The fact that the parties contemplated native law and custom is irrelevant in such a case. This rule which is manifestly biased against customary law has proven to be a powerful tool in the hands of the judges, who have used it to discriminate against rules of customary law, often without good cause.

For example, in *F. Innocent v M. Christine*,³⁷ the Supreme Court agreed with the Yaounde Court of Appeal that the native law and custom of the Beti tribe to which both parties belonged, could not apply to a dispute over a purported sale of a hut on the flimsy grounds that the said native law and custom did not provide for such a transaction. The fact that the sale of a hut or land in the village was unheard of in the past does not mean that such transactions should not be governed by native law and custom, if and when they do take place. After all, customary law, like life in the village that it governs, also evolves.

All the problems that beset customary law, however, cannot be blamed entirely on the colonial regimes or the post independence judiciary. The nature and the content of customary law as well as the question of those to whom it applies are not clearly defined.³⁸ During the colonial era, customary law governed the natives and it was easy to determine who was a native, since all whites were excluded. In other words, it was done on a racial basis. Today, with the whites gone, it has become necessary to introduce a new and clearer approach in determining not only who is a native, but also when native law and custom should apply.

It is also well to be reminded that bodies of customary law do not stand alone and

³⁷ Arrêt No. 10/CC du 22/2/1973 [1975] 7 Rev. Cam. Dr. 59.

³⁸ For a discussion of some of these difficulties, see White, "African Customary Law: The Problem of Concept and Definition" (1965) 9 J.A.L. 86; Alliot, "Problèmes de L'Unification de Droit Africains", (1967) 11 J.A.L. 86; Monie, "The place of Customary Law in Modern Africa" (1972) No.3 Annales de la Faculté de Droit du Cameroun, 65; and Pannier, "Le Source du Droit au Cameroon Oriental" (1972) No.3 Annales de la Faculté de Droit du Cameroun, 101.

are not self contained in Cameroon. Not all customary law rules span the length and breadth of Cameroon. Some vary from tribe to tribe and even within the same tribe may vary from village to village. They are divergent views on the issue of the resemblances and differences of customary law. Allott believes that "on the African continent the resemblances of customary law do not suddenly cease as one crosses a particular linguistic, ethnic or racial boundary...".³⁹ Others are of the opinion, especially with regard to marriage, that the diversity in matters of detail between the customs of different tribes and localities is so vast that "it is not even possible, save to a very limited extent, to trace any broad uniformity of basic principles".⁴⁰ My informed view, based on my experience and observation of customary law, is that while each tribal system may be undergirded by distinctive language, religious cult, myths of tribal and ethnic identity, whatever differences these may cause should not be exaggerated or overstated because a closer examination will reveal that they are but of detail, rather than principle; of form rather than substance. This, however, should not be taken to mean that these differences, small as they may be, are incapable of raising problems of interpretation and conflict of laws. Conflicts not only between customary laws and the received laws but between the various customary laws themselves. This conflict or potential conflict has no doubt been exacerbated by the acceleration of migration within the country. This (labour) migration in which superfluous rural labourers migrate to towns and cities to settle and are transformed into a permanent workforce or "proletariat" has produced a mix of various tribesmen living together, working together and naturally intermarrying. The necessity for the exercise of choice of law therefore sometimes arises as a result of the multiplicity of tribal laws.

It is in the area of personal law such as marriage that problems are most likely to

³⁹ Allott, *Essays*, p. 63.

⁴⁰ Phillips and Morris, *Marriage Laws in Africa*. 1971, p.6.

arise.⁴¹ To take a simple and increasingly common example, a man and a woman, who belong to two different tribes may contract a marriage, ostensibly in accordance with native law but without any clear indication as to which native law is applicable. Even where the parties come from the same tribe, a problem of conflict may arise if they do not happen to be resident in their tribal locality. The Bamenda Court of Appeal was confronted with this problem in **Onana Essomba v. Onana née Menye Jeanne D'Arc**.⁴² The parties, both Francophone Cameroonians, had married in Yaounde according to the native law and custom of the Beti tribe, from where they both hailed. The wife brought divorce proceedings in Mankon Customary Court, Bamenda because both parties happened to be resident in Bamenda at the time of this action. The Mankon Customary Court assumed that it had jurisdiction and granted a divorce. The appellant took the matter to the Bamenda Court of Appeal where he challenged the jurisdiction of the Mankon Customary Court. The Court of Appeal noted that even though the parties were based in Bamenda, the place of their domicile remained Yaounde. From that the court went on to hold that "since the parties had married under the custom of the Beti people, the Mankon Customary Court had no jurisdiction to hear the matter".

Although examples in purely contractual matters do not readily spring to mind, **Onana v. Onana** does hint at some of the conflict of laws problems that may arise at the level of customary law *per se*, especially as a result of urbanization and migration. Perhaps the most difficult problems facing the courts will be to devise ways of resolving the conflict of laws that arise in such situations, while at the same time allowing the customary systems to operate in the homogenous rural communities to which they are most suitable and which will remain for years to come the social milieu of millions of Cameroonians. These problems may be difficult, but they are not insurmountable. The reality is that their solution needs more willingness and

⁴¹ This has been highlighted in the case of Ghana by Allott, "*Marriage and Internal Conflict of Laws in Ghana*" (1958) vols. 2 & 3 J.A.L., pp. 164-184.

⁴² BCA/13CC/89 (Bamenda, 15.1.1990, unreported).

endeavour than the Cameroonian legislature and judiciary are prepared to offer. I do not intend to propose any solutions here. My aim has simply been to highlight the fact that customary law itself is not devoid of problems.

2. MODERN CONTRACT LAW.

By modern contract law I am referring to the received English common and French civil laws. The phrase is used in contradistinction to customary law and hereinafter, contract law shall mean modern contract law. If there is any reference to customary law, it will be specifically made. In this section, I intend to determine the extent to which English and French law can be considered as sources of contract law in Cameroon. Are they also subjected to certain limitations or do they apply in their entirety? Since the English common law applies only in the Anglophone provinces (the common law jurisdiction) it is convenient to treat it separately from French law which applies only in the Francophone provinces (the civil law jurisdiction).

(1). Sources of Contract Law in Anglophone Cameroon.

It has already been explained in chapter one how Great Britain became involved in Cameroon, and how they proceeded to introduce English law into their part of Cameroon. It was also shown that the Southern Cameroons High Court Law, 1955 (still in force) effectively guaranteed the continuous application of English law in many areas (contract law included), after the British had left. On the extent of the application of the law of England, section 11 of the said law provides:

"...(a) the common law; (b) doctrines of equity; and (c) statutes of general application which were in force in England on the 1st day of January, 1900, shall in so far as they relate to any matter with respect to which the legislature of Southern Cameroons is for the time being competent to make laws, be in force within the jurisdiction of the court".

Section 11 expresses in general terms the English law to be applied without spelling out the rules of the laws to be applied. Yet this lack of detail should

confound no one as to the sources of modern contract law in Anglophone Cameroon. Briefly, this comprises of the English common law, English doctrines of equity and pre-1900 English statutes of general application, legislation passed by the Nigerian legislature before 1954 (when Southern Cameroons broke away from Nigeria), legislation passed by the Southern Cameroons legislature after 1954 and those passed by the National Assembly (Parliament) after the re-unification of the federated states of West (Anglophone) Cameroon and East (Francophone) Cameroon in 1972.

(a). The Common Law.

In English law, the expression common law can be used in contradistinction to civil law which comprises mainly enacted law (like the continental systems) or in juxtaposition to equity. For the most part of this study, it shall be used in contradistinction to the French civil law but for the purpose of this present section, it is used to denote that part of English law which is unenacted and which has been developed through the decisions of the courts.

There has been some controversy (not only in Cameroon but in Ghana, Nigeria, and other territories with a similarly worded reception statute) as to whether the limiting date of 1st January, 1900 only refers to the statutes of general application or whether it also extends to the received common law. In other words, will the courts, in order to determine the content of any common law rule, have regard only to pre-1900 decisions or will they consult post-1900 decisions and their possible modifications as well? Two opposing views are involved here.

The first view, which can be described as the orthodox one, maintains that the common law is limited in its application to that which was in force in England on or before 1st January, 1900. Allott is an eminent supporter of this view. He takes the view that the limiting date applies to the common law so that common law decisions up to 1st January, 1900 are binding while the decisions coming after that date are only

persuasive.⁴³

The other view, championed by Park,⁴⁴ maintains that the limiting date applies only to statutes of general application and does not include the common law. In other words, the application of common law decisions is supposed to be timeless. The first view seems to me to be the better one. Firstly, it is in line with the interpretation of the provisions in several common law jurisdictions in the United States of America. The view taken there is that where a state constitution provided that "the common law in England shall remain in force, it is usually construed as referring to the common law of England as it stood at the time of the adoption of such a constitution."⁴⁵ Secondly, it gives the local courts, at least in theory, the opportunity to develop a case-law that reflects the local setting.

The decision of Cameroonian courts, unfortunately, do not provide any settled line of authority with which to resolve this issue. From the many decisions I have considered, I have been able observe that where the correctness or the appropriateness of a post-1900 English decision is in issue, the judges do not hesitate to assert that they are entitled to go their own way, especially if the said decision does not fall in line with their own reasoning of the particular problem in question. Even though the Bamenda Court of Appeal has ruled in *Joseph Atanga v. Shell Cameroon S.A.*⁴⁶ that pre-1900 English decisions are binding while post-1900 decisions are only persuasive, the general practice of the courts is still not quite clear. In contract law (as in other

⁴³ Allott, *"The Authority of English Decisions in Colonial Courts"* (1957) 1 J.A.L. 23; For more on precedents, see Allott, *"Judicial Precedent in Africa Revisited"* (1968) J.A.L. 3-31.

⁴⁴ Park, *Sources of Nigerian Law*. 1963, p.17.

⁴⁵ 15 *Corpus Juris Secundum* "Common Law" (1939) 617. Cited in Daniels, *The Common Law in West Africa*. 1964, p.122.

⁴⁶ Civil Appeal No.BCA/43/81 (Bamenda, unreported)

fields of law), the practice seems to be that post-1900 English decisions, where not specifically challenged, have continued to be cited routinely and applied as a matter of course, often without any acknowledgement, express or implied, that one line of authority is binding and the other merely persuasive. The point can also be made statistically.⁴⁷

As far as this thesis is concerned, English cases decided before and after 1900 will be freely cited. For reasons given below, I do not consider it legally desirable and practical to limit the use of English case law only to pre-1900 decisions. It has been remarked that the Cameroonian courts do cite post-1900 case law on a regular basis. While there certainly have been some differences of emphasis which have been gradually changing the direction of contract law in England compared with the equivalent rules as applied by the Cameroonian courts, it is nevertheless still true that the basis of modern contract law in Anglophone Cameroon remains the English common law and it would be impossible to understand and analyse the present framework of contract law in the common law jurisdiction of Cameroon, let alone some of its nuances, without equally considering not only the past, but the present developments in the law of contract in England. It is also apparent that pre-1900 and post-1900 English cases, whether treated as binding or persuasive, will continue to be accorded respect in Cameroonian courts. Therefore, where a proposition has been established by an English case originally, I shall cite the English case as well as any significant Cameroonian cases that have followed or adopted it. And where the law is the same in Cameroon and England, or where there is no reason to suggest it is different, I shall look for the best judicial exposition of the law, no matter where it comes from.

⁴⁷ Of a total number of 40 cases cited in a random selection of contract judgements by the High Courts and Courts of Appeal in Anglophone Cameroon, 13 were post-1900 English decisions, 15 were pre-1900 English decisions, 11 were Cameroonian, while there was 1 Nigerian and 1 Canadian decision respectively.

(b). Doctrines of Equity.

In addition to section 11 of the Southern Cameroons High Court Law, 1955 which includes doctrines of equity as part of the general law to be applied, section 14 provides that,

"where there is any conflict or variance between the rules of equity and the rules of common law, the rules of equity shall prevail".

Equity primarily means fairness but in a much narrower sense, it is used in contradistinction to strict law or common law. For example, it may compel the specific performance of a contract where the common law will only give damage for the breach of it. It is surely in this sense that it is used in section 11 of the South Cameroon High Court Law 1955.

The courts in Common Law Cameroon have been known to apply equitable doctrines to some contract cases even though they have been ambivalent in their decisions, perhaps because of the discretionary nature of equity. For instance, in *Menyoli Motors Co. Ltd. v. Frederick Ezedigboh*,⁴⁸ the West Cameroon Court of Appeal, applying the English decision in *Stocklosser v Johnson*,⁴⁹ upheld a general power to grant equitable relief against the forfeiture of the buyers deposit in a hire purchase contract after the rescission of the contract, where the sum forfeited was out of all proportion to the damage suffered by the seller and when it would have been unconscionable for the seller to retain the money. Yet in another case, *Ets. Tsewole v John Holt Motors*,⁵⁰ the same court made an about turn and refused to grant equitable relief in very similar circumstances.

It would be fair to say that Cameroonian courts are generally not enamoured by equity. A close scrutiny of some of their decisions reveals a predilection for strict

⁴⁸ Civil Appeal No. WCCA/7/68 (Buea, unreported).

⁴⁹ [1954] 1 Q.B. 476.

⁵⁰ Civil Appeal No. WCCA/21/70 (Buea, unreported).

law. As a result, one often finds decisions which cannot be faulted as a matter of strict law, yet cannot be said to have done justice to the parties.

(c). Statutes of General Application.

According to section 11 of the South Cameroonians High Court Law 1955, statutes of general application that were in force in England on or before January 1, 1900 are also to be applied by the Cameroonian courts. But the question must be asked: what exactly constitutes a statute of general application? Section 11 is silent on this and once again Cameroonian courts have failed to provide authoritative guidance on a fundamental question.

For an answer, it may be necessary to look up to Nigeria whose reception statute is couched in exactly the same language as that of Cameroon. In the Nigerian case of *Attorney General v. John Holt & Co. Ltd.*,⁵¹ Osborne, C.J. made a gallant attempt at an interpretation of the phrase "statutes of general application". He said that in order to determine whether or not a statute is one of general application, two preliminary questions have to be answered: (1) by what courts is the statute applied in England and (ii) to what classes of the community in England does it apply? If, on or before January 1, 1900 a particular statute was applied by all criminal and civil courts, as the case may be, to all classes of the community, there is a likelihood that it would be in force within the jurisdiction. If, on the other hand, it were applied only by certain courts (e.g. a statute regulating procedure) or only to certain classes of the community (e.g. an act regulating a particular trade), the probability is that it will not be held to be applicable locally. Even though the learned chief justice was self deprecating in conceding that his test was not infallible, he must nevertheless be credited with providing the most usable guidance to the question as to what constitutes a statute of general application.

Statutes of general application, unlike the common law, are not trapped in any

⁵¹ [1910] 2 NLR 21.

controversy over the time limit for their application. It is clear from the wording of the reception statute that only statutes of general application that were in force in England on or before 1st January, 1900 are to be applied by the Cameroonian courts. This has been confirmed by the the decision in *Mbuh M. Mathias v Joseph A. Tata*.⁵² In that case, the plaintiff orally agreed to sell his Datsun car to the defendant. It was agreed that the defendant would make an immediate advance payment of the price in cash while the balance was to be paid in eleven equal instalments. The plaintiff was later to seize the car, alleging defaults in payment by the defendant, and sue for the outstanding balance. The defendant counter-claimed for breach of contract, detinue and loss of use of the car.

The High Court, taking into consideration the fact that both parties admitted to having entered into a hire purchase agreement; that when the vehicle was seized it was still in the plaintiff's name and that the defendant never resisted or attempted to resist the seizure, arrived at the conclusion that the contract was one of hire purchase. On that construction it was held that the plaintiff was entitled to seize the car and claim the outstanding balance. The defendant appealed.

The Court of Appeal⁵³ differed with the High Court on the important question of the nature of the contract. It stated that it is always inevitable and essential that a hire purchase agreement be evidenced in writing and that in the absence of any document spelling out the rights and obligations of both the seller and the buyer, a sale by instalment payments (as in the present case) will nevertheless be a conditional sale of goods at common law. The Court of Appeal then reversed the High Court decision and ruled that the plaintiff was not entitled to a right of seizure. The proper remedy available to him, the court held, was an action for the outstanding balance. He in turn appealed.

The Supreme Court agreed with the Court of Appeal that the proper remedy available to the plaintiff was an action for the balance and not seizure but disagreed

⁵² HCB/7/78 (Buea, unreported).

⁵³ BCA/6/79 (Bamenda, unreported).

with it on the question of the nature of the contract, taking the view of the High Court that the contract was one of hire purchase. The Supreme Court pointed out that at common law a hire purchase contract may take any form - it may be under seal, it may be written and it may be oral, as in the present case. Even though the Court of Appeal made no reference to it, the Supreme Court⁵⁴ was also quick to point out that the requirement that hire purchase contracts must strictly be in writing is laid down in the British Hire Purchase Act, 1938 and emphasised that because it is a post-1900 statute, it does not apply to Cameroon.

While in some areas of the law the courts in Common Law Cameroon are entitled to apply post-1900 English statutes,⁵⁵ the general rule that only pre-1900 English statutes are applicable in Cameroon, applies to contract law. This means that the Cameroonian courts will apply only such statutes as the Sale of Goods Act, 1893 (and not the 1979 version), the Statute of Frauds 1677 (to the exclusion of the changes introduced to it by the Law of Property Act 1925 and the Law Reform (Enforcement of Contracts) Act 1954) and other statutes of general application in the field of contract law enacted before January 1, 1900. In principle, all the 20th century statutes English statutes on contract, of which there are many, do not apply in Cameroon. But it will not be impossible to find instances in which the courts have applied them, especially where such application is not specifically challenged by either party.

For the purpose of this study, pre-1900 English statutes must take precedence over post-1900 statutes. However, where relevant I shall cite post-1900 English legislation on contracts, if only to find out what differences exist between the present day contract law of England, which has experienced a lot of legislative incursions over the last few decades and its progeny in Common law Cameroon, which has been marked by legislative inactivity. It remains to be seen during the course of this study whether the impact of modern legislation on present day English contract law, though

⁵⁴ C.S. Arrêt No.138/CC du 18/9/1980 (unreported).

⁵⁵ For instance in family law, the English Matrimonial Cause Act 1973 still applies. It actually governs divorce in Common Law Cameroon.

considerable, is exaggerated.

(2). Sources of Contract Law in Francophone Cameroon.

It was noted in chapter one that on May 22, 1924, the French government passed a decree, article 1 of which declared that the laws and decrees promulgated in French Equatorial Africa before January 1, 1924 shall apply to the territory of Cameroon placed under the mandate of France. These enactments⁵⁶ became the applicable source of law and played an important role in private law and criminal law. *La jurisprudence* (case law) and *le doctrine* (legal writing) also played a significant role, even though, as sources of law, they remain secondary, at least in theory. Formally, only *la loi* is accredited as a source of French positive law. A brief discussion of these sources as they relate to contract will be helpful.

(a). *La Loi*⁵⁷ (Legislation).

A major characteristic of French law is the primacy of legislation. In Francophone Cameroon, as in France, law is perceived as being primarily and characteristically a body of rules enacted by the state, to be found in the codes and in legislation supplementary to the codes. A perusal of court decisions in French speaking Cameroon will confirm the formal view that the statute is the primary source of

⁵⁶ They have since been compiled into four separate volumes by two Frenchmen: Bounevet and Bourdin: **Code et Lois du Cameroun**. 1956 (Revised 1968) Volume II consist of, inter alia, the Code Civil, Code de Commerce and Code de Procédure Civile.

⁵⁷ In the French language, they are two words for law: *droit* and *loi*. The first refers to the legal system viewed in its entirety; the second signifies a specific statute or legislation. The second meaning applies here.

private law. The courts, required by statute to state the reasons for their opinion,⁵⁸ seldom fail to base them upon one or more statutory texts. In contractual matters, the courts invariably use the Civil Code, which is, in fact, the chief source of contract law in Francophone Cameroon. The Civil Code is contained in volume two of "Codes et Lois du Cameroun". The (Cameroon) Civil Code is arranged in exactly the same manner as the French Civil Code. Book 3 deals with Obligations (contracts included) and it is made up of 15 sections dealing with various kinds of contracts. Although the contents of both the Cameroonian and French Civil Codes are the same, any reference to the Civil Code throughout this study must be taken to relate to the Cameroonian version. Where the French Code is intended, I shall expressly state so. In addition to the Civil Code, there are some supplementary legislation relating to activities such as banking and insurance and formalities in contract.

(b). *La Jurisprudence* (Case law).

La jurisprudence in French law refers to court decisions and is therefore used in a completely different sense from the English meaning of the word. The attitude towards case law in Civil Law Cameroon is the same as in France. The constitutional theory that *la jurisprudence* cannot be a legal source is maintained. Formally, the function of the courts is to resolve disputes as they arise, not to create rules of law. Article 5 of the Civil Code forbids judges to decide cases submitted to them by laying down rules of a general or regulatory character. Article 4 on the other hand prevents a judge from refusing to decide a case on the ground that the law is silent, obscure or incomplete.

The effect of Articles 4 and 5 put together is that a judge may create a specific rule which he will apply to a case in hand. But the rule so created cannot, in principle, be of general application; in other words, it cannot serve as a binding precedent. I have stated the theory. In practice, decisions of a court of superior jurisdiction carry

⁵⁸ See Article 5 of (Judicial Organisation) Ordinance No. 72/4 of 26/8/1972.

more weight than theory is prepared to admit. As Carbonnier puts it, theory and practice may be reconciled by drawing a distinction between a source (in law) and an authority (in fact).⁵⁹ There is thus no rule of binding precedent, but there is some established practice that the lower courts will follow the decisions of higher courts.⁶⁰ This is true for both France and Francophone Cameroon. Decisions of the French *Cour de Cassation* are not binding on the civil law courts in Cameroon but they are nonetheless treated with much respect and generally followed.

This is a convenient juncture for me to make some interesting observations on judgements by the courts Francophone Cameroon, which are modelled on the French approach. As an Anglophone Cameroonian, and by analogy a common lawyer, I was initially very intrigued by the style and content of judgements as I began to read successive cases of both French courts and those in Civil Law Cameroon. Although the judgements are generally structured in three parts, namely: the major premise (*attendu 1*), the minor premise (*attendu 2*), and the conclusion (*attendu 3*), they are notorious for their rigorous brevity. As a result, it is not always a straightforward task to discern the legal reasoning or policy in these decisions. As Rudden has pertinently remarked,⁶¹ "the very act of decision implies a choice, but the French grammatical technique enables the judge to conceal it". But it is not just a question of grammatical technique. Bell has explained that French judges believe they must abstain from "providing reasons for reasons",⁶² which is to say that explanations for their reasons are not necessary as such explanations may be subjective and inappropriate to the judgement.

⁵⁹ Carbonnier: *Droit Civil*. (13th.ed.) Vol.1, para.31

⁶⁰ Nicholas, *French Contract Law*. 1982, p. 15.

⁶¹ Rudden, "Courts and Codes in England, France, and Soviet Union" (1973/74) 48 Tul.L.R. 1010, 1022.

⁶² Bell, "English and French Contract Law: Not So Different?" This was the subject of a lecture delivered on Thursday 23rd February 1995 at University College London.

While I was searching for relevant contract decisions in the Supreme Court, I was struck by a judicial practice, which was a revelation to me, largely because it has surprisingly not been noted in textbooks on the French legal system. I noticed that Supreme Court civil law judgements, brief at they are, are often extracted from detailed reports of the case. These reports, which are produced by the Advocate General or the *Rapporteur*, contain the full facts and history of the case, the legal arguments canvassed by both parties, as well as any relevant statutes or authorities to the case. A draft judgement (*projet d'arret*) is also produced for the benefit of the court. So, while the judgements themselves are often brief, it does not mean that they are lacking in legal reasoning. The reason why I make this observation is to demonstrate that civil law judgements of the Cameroon Supreme Court, as well as those of the French *Cour de Cassation*, are not always as syllogistic and deductive as common lawyers are wont to believe. Having said that, I am in a position to confirm that the civil law approach to writing judgements can be a source of frustration to many common lawyers. The detailed reports produced by the Supreme Court are not made available to the lower courts while the lower courts themselves do not prepare any such reports of their own. This implies that for most of the time one is confronted with sketchily written judgements, some of which actually smack of deliberate obfuscation of the legal issues.

(c) *Doctrine* (Legal Writing).

Legal writing or *doctrine* as it is known in French law, signifies the views of legal experts as expressed in books and journals. *Doctrine*, strictly speaking, is not a source of law in the sense that it does not lay down or establish the law but simply analyses and interprets the law. Yet, the importance and significance of *doctrine* to the law of contract in France and, by analogy, in Civil Law Cameroon, cannot be over-emphasised.

While *doctrine*, as an organised body of legal opinion, is in no sense a binding guide to any decision, it possesses high persuasive authority. Legal writers see their

mission as that of guide, collator of judicial decisions, commentator charged with maintaining cohesiveness and certainty in the law. The evaluation of the decisions of the courts is therefore an essential function of contemporary French doctrine. It is regrettable that *doctrine* remains largely undeveloped in Cameroon. There is therefore a heavy and an unavoidable reliance on the works and treatises of French writers, such as Carbonnier, Ghestin, Weill and Terré, Stark, Planiol and Ripert, etc. These are not only the prescribed texts in the local university, they are also relied upon by legal practitioners and the courts.

3. CONCLUSION.

This discussion on customary and modern contract law reveals that of the supposed partnership between the two, the former is very much the unequal and lesser partner. Although it is statutorily and judicially recognised in Cameroon, not all of it is to be regarded as "law". It may indeed be so at one level (in the native courts) but it must be elevated to another level, by passing certain tests, before it can be applied in the modern (non-native) courts, which have so far shown little regard for it. This unfortunate fact has not been lost even on Western commentators. Lampue⁶³ has lamented that it is in the domaine of obligations that the courts seem more prepared to discard customary law rules in favour of modern, written law. His view is lent credence by Pannier,⁶⁴ who draws attention to the fact that even after independence, instances in which the rule of customary law of obligations have been successfully invoked before the Supreme Court are extremely rare. Customary contract law in Cameroon, therefore, has about it a second-hand quality. And because it has failed to influence significantly the received English and French laws, it will not be considered henceforth, except to the extent that a particular issue becomes significant,

⁶³ Lampue, "*Droit Ecrit et Droit Traditionnel en Afrique Francophone*" (1979) Pennant, 245 at 265.

⁶⁴ Pannier, *Op. cit.*, note 38.

in which case it will be discussed under the relevant section of the investigation. From now onwards I shall concentrate on the received English and French contract laws, which, it must be stressed, is of primary concern to this study.

CHAPTER THREE

INTERNAL CONFLICT OF LAWS IN CONTRACTUAL
OBLIGATIONS.

In chapter one of this work, the genesis of the plural legal system in Cameroon was explained. In subsequent chapters, some of the consequences of their existence and nature will be considered. But for now it is necessary to look more closely at the rules by which any conflict or potential conflict between one system of law and the other can be resolved within the framework of the general territorial legal systems which have been thus created.

As the title of suggests, this chapter is primarily concerned with internal conflicts of law as opposed to the ordinary international conflict of laws. Since internal conflict of laws may take various forms in Cameroon, it is important at the outset to delimit the boundaries of the sort of conflicts that are capable of arising. In the first place there may be a conflict of laws concerning customary and modern/western law. This sort of conflict has already been considered¹ and is therefore excluded from the present discussion. There may also be a conflict between customary law *per se*, i.e. between the various tribal laws. This kind of conflict, which has been variously called "interpersonal"² "intergentiel"³ and "inter-tribal",⁴ is of great interest but I propose to say no more about it here. Thirdly, customary laws may conflict with Islamic law. Such a conflict may arise in the north of Cameroon where Islam is

¹ See chapter two which treats of customary contract law versus modern contract law.

² Bartholomew, "*Private Interpersonal Law*" (1952) I.C.L.Q., 325; Pearl: *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh*. London, 1981.

³ This is a term employed mainly by Dutch writers. See e.g. Kollewijn, "*Droit intergentiel en Algerie*" (1954) no. 3 Rev. Jur. Union Française, p. 312. See also Gohr, *Intergentiel recht, Rechtskundig Weekblad* 1939-40, cited in Bouckaert, "*Les Regles de Conflit des Lois en Afrique Noire*" 1967 Pennant, 3.

⁴ Allot: *New Essays in African Law*. 1970, p. 108.

established as the dominant religion. In practice, however, Islam is treated as a form customary law in Cameroon.⁵ This sort of conflict is therefore a variant of the second type of conflict mentioned above and will not be considered here. Finally, there is the conflict between the two "western" legal systems which operate concurrently, but with spatial separation, in Cameroon. It is this conflict between the common law and the civil law that is my major pre-occupation here. Because social and commercial intercourse in the sphere of private relations takes many forms, this type of conflict transcends many areas of law, but treatment here shall be limited to contractual obligations.

A full comprehension of the need for the study of conflict of laws rules within Cameroon must begin with the recognition of the basic fact that the law of contract in both law areas of Cameroon is a reflection of their respective common and civil law origins. In other words, while both of them deal with the same phenomena of contract, in most cases they deal with it, or approach it, differently. This different treatment of contracts by different systems of law within the same country is bound to give rise to conflict of laws problems. It should go without saying that there should be established conflict of law rules under such circumstances, yet contrary to such expectations, these problems have so far received very scant attention in Cameroon.⁶ It is my aim here to highlight and expose some of these problems, to point out the undesirability of current judicial practices and the conspicuous absence of proper solutions, and to propose possible ways of bringing about more desirable solutions.

1. THE NATURE OF THE PROBLEM

It has already been mentioned that the Cameroonian court structure is fashioned

⁵ Anyangwe: *The Cameroonian Judicial System*. 1987, p. 247.

⁶ Only recently has there appeared a brief commentary on this subject. See Nkweta Muna, *"Conflict of Laws in Cameroon - An Observation"* (1992) *Le Monde Juridique*, (Special edition) 1992, pp 62-64.

on the the French model, with the result that several courts of equal status exist throughout the country. Although the territorial jurisdiction of these courts is limited by administrative boundaries, they nevertheless do have jurisdiction over non-resident persons resident anywhere in Cameroon through the mere service of writs of summons.⁷ Of Cameroon's ten provinces, two (the South West and the North West) are English speaking, with their courts applying the (English) common law of contract. The other eight provinces are French speaking and their courts apply the (French) civil law of contract. The Civil Code in particular governs contract in the civil law jurisdiction of the country. As a result of this legion of courts and the different laws that they apply, it is inevitable that problems involving the choice of law and choice of jurisdiction should arise.

Cameroonians move freely from the common law jurisdiction to the civil law zone (and vice versa) and as a matter of necessity, enter into relationships with others present or living in other territorial units that may end up in litigation. If the law of Province A is, on the relevant issues, the same as that in Province B, and if the applicable law may be that of Province A or B, there would be no need for any one to argue about whether the law that applies is that of Province A or Province B, and if no one is going to argue about that question, there will be no problem of conflict of laws. Therefore, where the contract has all its connections with one law area, no conflict of laws arises.

The basic pattern that precipitates internal contractual conflicts can be stated simply: A from Bamenda in the North West Province (common law) enters into an alleged contract with B in Douala in the Littoral Province (civil law) whereby B is to undertake the repairs of A's car in his mechanical garage in Douala. This factual situation⁸ has as its main feature the fact that it contains one or more 'foreign'⁹

⁷ It must be stressed that a writ, i.e. a court summons, can be served on anyone anywhere in Cameroon without leave, by reason of presence in Cameroon.

⁸ *SHO Cameroun/Africauto v. Albert Ngafor* (BCA/3/74, unreported), see *infra*, note 39.

elements. Each relevant fact has a geographical connection with at least one territorial unit (the North West Province) other than the Littoral Province. In the event of a dispute, A may want the matter tried in Bamenda court where he knows the courts will apply the common law while B may consider it a matter for the Douala courts, in which case the civil law will apply. Ideally, any court confronted with this countervailing contentions must decide what law must be applied to resolve the controversy.

This case illustrates how and why a conflict of laws problem can arise within Cameroon. Bamenda was actually the jurisdiction in which A, the plaintiff, chose to bring the proceedings, or as conflict lawyers call it, the *forum*. The plaintiff selected that forum perhaps because he wanted its law (the *lex fori*) to apply, perhaps because he considered it cheap and convenient for him, since he was resident in Bamenda. The defendant, on the other hand, argued against the jurisdiction of the Bamenda court partly because Douala was the place where the alleged contract was formed and was to be performed, or as conflict lawyers call it, the *lex loci contractus*, and partly for the same reasons that the plaintiff chose Bamenda. Ultimately, the Bamenda Court of Appeal, affirming the High Court, resolved the question, rather unconvincingly as I shall explain later, in favour of the plaintiff.

2. THE PROBLEM OF FORUM SHOPPING.

The tactic whereby the plaintiff attempts to bring his suit before a forum that best suits him is known as *forum shopping*. Forum shopping has been defined as:

"a plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would

⁹ The phrase "foreign element" is used in the present context to mean a contact with another system of law or law area in Cameroon, other than that of the forum. It does not mean a system of law that is completely foreign to Cameroon.

not be available to him in his natural forum."¹⁰

There is, however, a difference in the art or practice of forum shopping as between say England and Cameroon, even though the reasons for it may be the same. In most of the cases that have come before the English courts, such as **The Atlantic Star**,¹¹ **McShannon v. Rockware Glass Ltd.**,¹² and the **Abidin Daver**,¹³ the plaintiffs have been foreigners or non-residents who have sought to use the English courts for whatever reasons. But in Cameroon, the reverse is the case. Typically, an Anglophone who is resident in the Anglophone part of the country, will insist on bringing an action before the Anglophone courts. It is of little interest to him that the contract was most closely connected with the Francophone part. The same goes for a Francophone plaintiff, vis-à-vis, the Anglophone part. It is unlikely for an Anglophone who is resident in the common law area and involved in a contractual wrangle with a Francophone resident in the Francophone part, to sue voluntarily in the courts of the civil law area.

In the light of this peculiarly Cameroonian practice, I shall define forum shopping in Cameroon as the choice by an Anglophone (or vice versa for a Francophone) plaintiff of his local courts rather than the Francophone courts as the place in which to bring his litigation because he thinks there will be advantages, either real or imagined, in suing in his local courts. That explains why in the example just considered above, A chose to bring the matter before a court in Bamenda where common law applies while B was strongly opposed to that.

A choice between the courts of the civil and common law areas may be made for various juridical and personal reasons. Firstly, behind the issue of jurisdiction, lies the crucial implication that the court found to have jurisdiction shall apply exclusively the law of contract that operates in its part of the country to all aspects of the dispute,

¹⁰ *Per* Lord Pearson in *Boys v. Chaplin* [1971] A.C 356, at 401.

¹¹ [1974] A.C. 436

¹² [1978] A.C. 795

¹³ [1984] A.C. 398.

even if the case has connections with the other law area. Cameroonian courts have not been known to admit of *depeçage*, which allows for different aspects of a contract to be governed by different systems of law, so that for instance, questions of formation, validity and interpretation are governed by one system of law (e.g. the civil law) and question of performance by another (e.g. the common law).¹⁴ Neither do they practice '*splitting of the contract*' whereby the obligation of each party would be governed by a separate system of law, such as the law of the place of his performance or the law of his domicile.¹⁵ To choose a court is also to choose the legal system of the territory in which that court functions, not just its law on contracts. Thus, for example, in the case of a contractual claim, the ultimate, dispositive, desire of one system of law that the plaintiff should or should not receive something, and if yes, what or how much, is what that system of law says on that claim. This ultimate desire is not fed by the law of contract alone. It also reflects the attitude of that system of law on such questions as, whether the claim has been made in time, whether the plaintiff is owner of the right, or whether, perhaps, the right has been passed, by assignment, succession or some other devolution, to state only a few.

If one considers that the answers to these questions can be different under both systems, it becomes clear that some advantages may be gained by suing under a particular system. The damages may be higher, the burden of proof may be less

¹⁴ See the cases of *Salao Liman v. Abanda*, (BCA/20/83), discussed *infra*, note 81, and *Nche v Momolou & others*, (BCA/18/82), discussed *infra*, note 82. In both cases, the contracts were concluded in Douala (civil law) while the actions were brought in Bamenda (common law) because that is where the parties did business and were resident. But at no point during either hearing did the court consider the fact that the contract was formed in the civil law part of the country as relevant. In other words, the Bamenda court applied common law to all aspects of the contract, i.e. in determining whether or not the contract had been formed, the common law and not the civil law was applied.

For more on *depeçage*, see Lando: International Encyclopaedia of Comparative law, Vol. 3, Chapter 24, no. 2 and nos. 15-22.

¹⁵ See the cases above, note ; see also, Lando, *Op. Cit.*, note 14, nos. 22-24.

stringent, the limitation period may be more generous, and the trial may be faster and cheaper. In practice, however, it can be difficult to determine such procedural advantages and many litigants would not give it much thought.

More often, the real reasons for forum shopping are personal and cultural and are based on such considerations as cost, convenience, and confidence in a particular system. Cameroonians are mutually suspicious of the opposing legal systems operating in their country. Anglophones are generally mistrustful of the civil law system. They will tell you they have no confidence in it because it is lacking in integrity and efficiency. By the same token, Francophones feel very uneasy about the common law system. This type of paranoia can be explained by the fact that the majority of Cameroonian lawyers are not conversant with both systems. They have generally been trained either in the common law or in the civil law tradition, but not in both.¹⁶

There is also the language problem. The courts in Anglophone Cameroon conduct business in English while those in Francophone Cameroon do so in French. Although the country is said to be bilingual, with English and French as the official languages, in reality most Cameroonians are not bilingual, in the sense that they are not proficient in both languages. This is also true of members of the Bench and the Bar. This language handicap means that lawyers do not have linguistic access to the opposing legal culture and as a result, they encourage their clients to avoid it. In principle, it can be argued that by virtue of Article 1 (3) of the Cameroonian Constitution - "The official languages of Cameroon shall be English and French" - every Cameroonian can use the language of his choice in any court throughout the country. But Article 1(3) does not specifically guarantee any litigant the right to trial in the language of his choice and the justiciability of that provision is yet to be legally

¹⁶ There is an increasing number of Anglophone lawyers who have taken up the challenge to set up practice in the French speaking part but as of now only one Francophone Cameroonian is facing up to the corresponding challenge by moving to Anglophone Cameroon, and even then, he is still a pupil barrister.

tested.¹⁷ While some of these problems may be overcome by translation, it should be noted that the courts, with the possible exception of the Supreme Court, do not have any translators on their staff.¹⁸ Besides, there are major disadvantages in translation in relation to legal problems, because the translation of legal terms from one language to another is not simply the translation of words but the translation of concepts, and there are peculiar problems in the translation of the law. Anything therefore that makes it less necessary to translate will clearly be an advantage to people involved in litigation. Finally, considerations of costs as well as sheer convenience are very likely to give rise to forum shopping.

Yet, despite the fact that there may be some real advantages in being able to choose the jurisdiction in which to litigate, the conventional view is that forum shopping is something to be discouraged.¹⁹ In the *Atlantic Star*, Lord Reid said,²⁰ "There have been many recent criticisms of 'forum shopping',... and I regard it as undesirable." The objections to forum shopping in England - often couched in terms such as public policy, sovereignty,²¹ judicial chauvinism and judicial comity²² - are already too well known to be given any treatment here.

While the undesirability of forum shopping should clearly extend to Cameroon too, objections based on sovereignty and chauvinism need not be invoked because one

¹⁷ There does not seem to be any local case in which the issue has come up for judicial determination.

¹⁸ During my last visit (June 1994) to the Supreme Court I found 4 translators, 3 of whom have no legal background at all. Little wonder that some of the translation leaves a lot to be desired.

¹⁹ Diamond, *"Harmonisation of Private International Law"* (1986) vol.4, Rec. des Cours, 245.

²⁰ [1974] A.C. at 454.

²¹ Robertson, *"Forum Non Conveniens in America and England: A Rather Fantastic Fiction"* (1987) 103 L.Q.R. 398.

²² See Lord Diplock in the *Abidin Daver* [1984] A.C. 398 at 411.

must therefore be based on more practical grounds. First of all, it can result in unfairness to the defendant. This is not to suggest that the defendant is always the persecuted saint: some defendants merely try to delay or put off the proceedings by applying for a stay or a transfer of the case to a forum where they believe they too may have an advantage. The case of **Atabong Ets. v. Socmatsa & Ets. J. Lifebre**,²³ considered below, bears testimony to that. But whether the plaintiff is using it to gain unfair advantage or the defendant is using it to unduly delay the proceedings, it remains objectionable.

Another objection can be justified in terms of public interest. If an Anglophone plaintiff is allowed to sue in his local court over a matter that clearly has all its other connections with a Francophone province, the result will be that the witnesses and the evidence (which may all be in French) will have to come from that province at great cost not only to the parties but to the state as well.

Other related problems of forum shopping shall be considered below as I probe the questions of choice of jurisdiction and choice laws.

3. *THE SCOPE OF INTERNAL CONFLICT OF LAWS.*

The exact scope of the conflict of laws differs from country to country. Even leading academics are not agreed on it. Frederick Harrison thought that it is "solely concerned with the practice of the tribunal."²⁴ According to Castel, it deals with the jurisdiction of the courts, the recognition and enforcement of foreign judgements, domicile, and choice of laws.²⁵ Many American authorities consider it to deal mainly with the following five matters: - jurisdiction of the courts; foreign judgements;

²³ *Infra*, note 38.

²⁴ Harrison: *Jurisprudence and the Conflict of Laws* (ed. 1919). pg 125-126, cited in Graveson: **Comparative Conflicts of Laws: Selected Essays**, Vol. 1, 1977, p. 99.

²⁵ Castel, *Canadian Conflict of Laws*. 1986, p. 6.

choice of law; jurisdiction to tax; and aliens and non residents.²⁶

French writers are no more agreed on the scope of the subject either but view it similarly in terms of one or two or three or all of the following: choice of jurisdiction; choice of law; aliens and nationality; and the effect of foreign judgements.²⁷

Between these views on the scope of the subject stands the general view of the English writers that conflict of laws finds its uniformity and is built up around three major topics: choice of law, choice of jurisdiction, and recognition of foreign judgement.²⁸

While it is admitted by some that a problem in the conflict of laws may involve only one of these three questions,²⁹ the assumptions have been made by others which seem to raise it to a principle of law, that whenever a court is dealing with a question of conflict of laws it must necessarily consider both its own jurisdiction and the choice of the appropriate law.³⁰ This appears to be the view taken in France as well.³¹

The corpus of conflicts of law in Cameroon has never been determined but one will not be out of place to assume that in the common law part, it covers the

²⁶ Cheatham, Goodrich, Answold, and Reese, *Cases and materials on the Conflict of Laws* (3rd ed., 1951), p. 1 but see 8th ed. (edited by Reese and Rosenberg) 1984 pp. 2-3, where the topics have been reduced only to the first three.

²⁷ See Loussouarn, and Bourel: *Droit International Privé*, 1978, para. 3; and Mayer: *Droit International Privé*, *passim*. 1973.

²⁸ Dicey and Morris, *Conflict of Laws*. 1987, vol. 1, p. 4-5; Cheshire and North, *Private International Law* 1992, p. 7; Graveson, *Conflict of Laws*. 1974, pp. 12-21.

²⁹ Graveson, "Choice of Law and Choice of Jurisdiction in the English Conflict of Laws" In: *Ibid*, Graveson, *Selected Essays*, p. 99.

³⁰ Castel, *Op. cit.*, note 25 , p. 7; Diamond, *Op. cit.*, note 19, p. 245.

³¹ Loussouarn and Bourel, *Op. cit.*, note 27, para. 439.

traditional questions of jurisdiction, choice of law, and recognition of foreign judgements while in the civil law part, it covers those same questions plus that of nationality. This assumption is based on the fact that the English and French conflict of laws were included in the package of laws that were introduced into Anglophone and Francophone Cameroon by Britain and France respectively.³² In other words, were a court in Cameroon confronted with an ordinary (international) conflict of laws problem as opposed to an internal conflict of laws problem, that court will apply the rules of conflict of laws that was in force in either France or England (depending on whether the court is based in Francophone or Anglophone Cameroon) at the time of the reception statutes.

However, as one is dealing with internal conflicts here, not all questions of international conflicts are pertinent. Only the question of choice of jurisdiction and choice of law will be considered. The question of the recognition of foreign judgements is excluded because it would not arise in a purely internal conflict situation in Cameroon. The Judicial Organisation Ordinance 1972 makes it clear that any judgement by any Cameroonian court is enforceable throughout the national territory. For example, a British national sues a Cameroonian in London over a car sale, gets judgement in his favour and then discovers that for some reason - perhaps the defendant has absconded with the car to Cameroon - the judgement cannot be enforced in the U.K. If he decides to pursue the defendant to Cameroon, he will have to go to a local court, which shall decide whether or not to enforce the British judgement. But if a British citizen successfully sues an Anglophone Cameroonian in Douala (civil law area) and discovers that the defendant had absconded to Bamenda (common law area) in an attempt to frustrate the enforcement of the judgement, he will not need any further court action in order to get the judgement enforced. He will be able to enforce the judgement anywhere in Cameroon.

³² For the sources and reception of Conflict of laws in Africa, see generally Uche, "Conflict of laws in a Multi-ethnic Setting: Lessons for Anglophone Africa" (1991) vol. 111, Rec. des Cours, p.273-283; Bouckaert, "Les Règles Conflit de Lois en Afrique Noir" (1967) 77 Pennant, 1-12, Lampue, "Le Conflits de Lois D'Ordre International en Afrique Francophone" (1972) 82 Pennant, 455-472.

Returning to the question of choice of jurisdiction and choice of law: In England, the assertion has often been made, that both the question of choice of law and choice of jurisdiction are common to all questions of conflict of laws. While there is historically very strong evidence that English courts have built up their rules on the conflict of laws on the general principles of the co-existence and mutual independence of the two broad questions of choice of law and choice of jurisdiction,³³ it nevertheless must be pointed out that these questions are independent of each other.³⁴ This is also the position in French law, as confirmed by the following observation, "*les conflits des juridictions sont préalables aux conflits de lois; ils sont distinct de ces dernier, mais leur demeurent étroitement liés.*"³⁵

(1). Choice of Jurisdiction.

For ease of exposition, I shall divide Cameroon into two states: the state of West Cameroon, as the English speaking part was known during the Federation, and the state of East Cameroon, that of the French speaking part. West Cameroon covers the current two Anglophone provinces which represent the common law area while East Cameroon covers the eight Francophone provinces representing the civil law area.

Two kinds of jurisdictional conflicts are possible in Cameroon. The one is intra-state i.e. the conflict in the territorial jurisdictions between two courts within the same state or law area. Because all courts in one state or one law area apply the same system of law, any jurisdictional problem that may arise will not involve any choice of laws. There are rules governing this kind of jurisdictional conflict and some of

³³ Graveson, *Selected Essays*, pp. 100-103.

³⁴ Fawcett, "*The Interrelationship of Jurisdiction and Choice of law in Private International Law*" (1991) C.L.P., 39;

See Beale's comments in *Lectures on Conflict of Laws and International Contracts*, 1951, p. 2-3; and the familiar case of *Robinson v. Bland* (1760) 1 WBL 234. The importance of this case lies in the fact that it is one of the earliest cases to modify the elementary rule of *locus regit actum* into the more refined doctrine of the proper law, albeit in an undeveloped form.

³⁵ Loussouarn and Bourel, para. 439

them are highlighted below.

The second type of conflict, which is of immediate interest to me here, is the conflict of jurisdiction that involves courts from the different states or law areas. Are there any rules on jurisdictional conflict, and if so, what is their content. The answer is that there are rules for intra-state jurisdictional conflicts but none for interstate conflicts. In order to fill this gap, the courts have relied on intra-state rules when confronted with an interstate conflict problem. These rules are to be found in the law of procedure of both law systems.

In the common law part, **Order 7 rule 3** of the Supreme Court (Civil Procedure) Rules³⁶ provides that:

"All suits for the specific performance or upon the breach of any contract, may be commenced and determined in the judicial division in which such contract ought to have been performed or in which the defendant resides"

For Civil Law Cameroon, **Articles 8 and 9** of the **Code de Procédure Civile**³⁷ provide, *inter alia*, that such actions can be brought in the place where the contract was formed or where it was performed as long as one of the parties is resident in that place.

Before these rules are analysed, it will be helpful to illustrate by way of concrete examples, how the the courts interpret them in the first place. **Atabong Ets v. Socmatsa & Ets J. Sifebre SA**³⁸ provides a very good example. The plaintiff was Anglophone, resident in Limbe, Fako Division (common law) while the defendants comprised a firm based in Douala, Wouri Division (civil law). By an agreement concluded in October 1982 and signed in Douala, plaintiff leased his building situated at Ombe (Fako Division) to defendants for a two year renewable period. In August 1983, the defendants handed over the keys of the premises to the plaintiff thereby

³⁶ Supreme Court (Civil Procedure) Rules, vol. 10, chapter 211 in Laws of the Federation of Nigeria, 1948.

³⁷ This was introduced by Arrete du 16 Dec. 1954 and is to be found in Codes et Lois du Cameroun, vol. II.

³⁸ CASWP/19/85 (Buea, unreported).

indicating a willingness to bring the lease to an end. The plaintiff then brought this action alleging that (i) the defendants owed rents, (ii) had failed to keep the premises in tenable repairs and (iii) had failed to give three months notice of termination of contract, contrary to the terms of the contract. The plaintiff sued in his local high court, (the Fako High Court, Buea). The defendants raised a preliminary objection to the jurisdiction of Fako High Court on the grounds that; (i) both of them (defendants) were resident in Douala, and (ii) the contract was entered into in Douala. They argued accordingly that it was the Douala High Court (Civil Law) that had jurisdiction over the matter. Their argument was no doubt based on articles 8 and 9 of the *Code de Procédure Civile* which governs such matters in Civil Law Cameroon. The trial judge agreed with the defendants and granted a stay.

The South West Provincial Court of Appeal (the plaintiff's local Court of Appeal) overturned the High Court ruling. It was pointed out that since O.7 r.3 of the RSC allows for the suit to be commenced and determined in the judicial division in which the contract was performed (in this case Fako) or in the division in which the defendant resides (in this case Douala), the trial judge was wrong at law to have ruled against the jurisdiction of the Fako High Court, in the absence of any clause expressly stating that any dispute arising from the contract was to be brought only before the Douala court. The case was thus remitted to the Fako High Court for hearing and determination.

The Court of Appeal certainly needed no heroic feats of interpretation to eliminate Douala as the forum. If O.7 r.3 of the RSC gives the plaintiff a choice between the place of performance and defendant's residence, there is no reason why a court should not honour the plaintiff's choice, in the absence of any contrary intention by the parties themselves. In the light of such clear and unambiguous provision, the decision of trial judge to ignore the first limb of O.7 r.3 (the place of performance), in preference of the second limb (the place of defendant's residence) was, to say the least, very curious. Worse still, the trial judge failed to address his mind to O.7 r.1 which states that in matters involving land, jurisdiction lies with the court in the place where such land is situated (the *lex situs*). Had he done so, he probably would have

disposed of the case with much less difficulty by finding in favour of the Fako High Court. It is surprising that the Court of Appeal too lost sight of Order 7 r. 1. On the whole, it is submitted that the Court of Appeal ruling is the proper one, both on the interpretation of 0.7 r.3, which the court applied, and 0.7 r.1. which it did not. Yet the case nevertheless indicates that there are real problems involved with interstate jurisdictional conflicts.

Another case in which a jurisdictional problem arose is **S.H.O. Cameroun/Africauto v. Albert Ngafor**.³⁹ The action was founded on tort but it could equally have been based on contract, so it is instructive here. The respondent/plaintiff was Anglophone and was resident in Bamenda, North West Province (common law). He alleged that he had taken his car to the appellant's garage in Douala (civil law) for repairs, that they had kept it for many months without repairing it and had refused to give it up on demand.

The appellants denied this allegation and averred that the respondent had abandoned his car in their garage, without paying the required deposit for repairs and leaving no name and address. They added that the car was badly damaged and that since the respondent never came back for it nor gave them any orders to repair it, they decided to sell the car after having unsuccessfully tried to locate the respondent with the assistance of the Ministry of Transport.

The respondent brought an action for detinue against the appellants, not in Douala where the alleged contract of repair was to be performed or where the alleged tort of detinue was committed, but in Bamenda where he was resident. Not surprisingly, the appellants applied for a stay of the Bamenda proceedings on the grounds that it violated Order 7 r.4 of the Supreme Court Rules.⁴⁰ But as if the matter was not

³⁹ BCA/3/74 (Bamenda, unreported).

⁴⁰ Nowhere does Order 7 provides for torts but 0.7 r.4 provides with regards to other suits thus: All suits may be commenced and determined in the judicial division in which the defendant resides or carries on business. If there are more defendants than one resident in different judicial divisions the suit may be commenced in any such divisions; subject, however, to any order which the court may, upon the application of any of the parties, or in its own motion, think fit to make with the view to the

already sufficiently convoluted, counsel for the appellant/defendants argued, rather strangely, for the case to be transferred to the Buea High Court. It is impossible to find the legal basis for such an outlandish application. Buea is in a different province (the South West) from Bamenda (the North West) and Douala (the Littoral) and Buea had no connection whatsoever with the transactions that led to the action. Further still, the Buea High Court, assuming it was granted jurisdiction, would have had to apply the common law, not civil law, by virtue of its location in Common Law Cameroon. One would have thought that the main reason why the appellants opposed the jurisdiction of the Bamenda court in the first place, was not unconnected with the need to avoid having to face up to the common law, coming as they did from Douala. The proper place to have asked for a transfer therefore was to the Douala High Court. In any case, the trial judge refused to grant a stay, ruling that the Bamenda High Court was a proper forum. The appellants took their appeal to the Bamenda Court of Appeal. Prominent on their grounds of appeal was their initial objection *in limine* to the jurisdiction of the Bamenda High Court.

The Court of Appeal upheld the High Court decision not to grant a stay, but on the rather flimsy ground that it was within the discretion of the trial judge, which discretion they saw no reason to interfere with. It then added, poignantly, that had the trial court succumbed to the appellant's prayer for a transfer of the matter to the Buea High Court, the court would have acted in violation of the rules since the tort was committed in Douala and not in Buea.

The decision of the Court of Appeal not to overrule the trial court and grant appellants a stay is questionable. Implicit in the Appeal Court's observation that a transfer of the case to Buea would have been at odds with the rules because the tort (detinue) was committed in Douala, not Buea, is an acceptance of the fact that the case had most of its relevant connection with Douala. It is therefore difficult to predict whether the Court of Appeal would have granted a stay had the appellants applied for a transfer to Douala instead of Buea. Whatever the case, it is strongly

most convenient arrangement for the trial of the suit.

submitted that in cases such as this, it is important that the true grounds for the granting or the refusal of a stay should be expressly articulated, and not concealed behind misleading references to the discretionary power of the trial judge.

This case does not only highlight the problems that jurisdictional conflicts involving courts of both the common law and civil jurisdictions can generate but also serves to emphasize the inadequacies of the rules of intra-state jurisdictional conflicts as solutions to jurisdictional conflicts involving the courts of both systems of laws. More on these inadequacies later. I now turn to the related problem of choice of law.

(2). Choice of Law.

Choice of law problems in contractual matters may arise in three set of circumstances. The first is in relation to international contracts, where the introduction of a foreign element may give rise to a question of choice of law. This is an external conflict situation which should normally be resolved by applying conflict of laws rules, with which I am not directly concerned.

The second reason why a contract may give rise to choice of law is where litigation is in a 'foreign' court. The word foreign is again used here to refer to a court in a province other than that which might be regarded as the obvious place to litigate. If a contract has all its links with Province A (common law, for instance), any litigation before the courts of that province will not give rise to any question of conflict of laws.

But what if the contractual dispute linked only with Province A comes before the courts of Province B, a civil law province. For example, where the defendant moved his place of business from Province A to Province B after the contract was made. Should the courts in Province B not apply rules of conflict of laws in order to establish that the contract is governed by the law in force in Province A, which is the common law, rather than the law of Province B - civil law - which the courts would normally apply.

As already mentioned above, one would expect any country with the world's two main legal systems operating in it, side by side, to have some highly developed choice

of law rules in place, by which any conflict between these laws may be resolved.⁴¹ Sadly, and perhaps, mysteriously, Cameroon has no such machinery. The courts have been left to their own devices to sort out the mess and they have responded by operating as though there was no such problem.⁴² So far, the question of choice of law has been inextricably linked to the jurisdictional question. Both questions have been taken to be one and the same thing. They have never been raised or treated separately in any internal conflict problem. The choice of jurisdiction automatically carries with it the law of that jurisdiction. On the face of it there is nothing wrong with that but the problem is that courts employ intra-state rules of jurisdiction to assume jurisdiction even in cases that have most of their connections with a different state or law area. The courts consider the crucial question to be whether the plaintiff is subject to the jurisdiction of the court which he has chosen rather than the appropriateness of that court to try the suit.

And because the emphasis in any conflict or potential conflict case is often placed solely on a point of jurisdiction and rarely on both a point of law and a point of jurisdiction, a lack of balance between the questions of choice of law and choice of jurisdiction has been reflected in the general body of law. The fact that the question of jurisdiction has overshadowed the question of choice of law does not *ipso facto* deny the existence of both questions but derives from the incompletely developed state of Cameroonian conflict of laws rules. To acknowledge this situation is the first step towards its proper solution.

⁴¹ The German government, in anticipation of internal conflict of laws problem after re-unification, took prompt steps to legislate for any such problems. Article 8 of the Reunification Treaty of 1990 practically unified all areas of the respective private laws of the defunct East and West Germany, with only few exceptions. See generally, Kreuzer, "*Les Conflits de Lois Inter-Allemandes après l'Unification de L'Allemagne*" (1993) 82 R.C.D.I.P., 1, especially at pp. 6-7.

⁴² The reticence of Cameroonian courts on conflict of laws questions in the area of family law has been the cause of lament. See Ngwafor's case comment of *Yufanyi v. Yufanyi* (HCSW/25/MC/84) in (1990) no.2 Jur. Info 46.

4. A CRITIQUE OF THE CURRENT PRACTICE.

It was said above that the current practice of employing intra-state procedural rules on jurisdictional conflicts involving the courts of both law areas is largely inadequate. So too has the total emphasis on only the jurisdictional question been condemned. It is now proposed to elaborate further on both these issues.

The first significant point to make against the use of intra-state jurisdictional rules of Common Law and Civil Law Cameroon is that they were never intended to solve jurisdictional conflicts that transcend the legal frontiers within Cameroon. They were meant to solve questions of territorial jurisdiction between courts within the same legal system, in very much the same as the courts within France, for example, would do.⁴³ This is obvious from the fact that these provisions were already in force long before Cameroon ever became independent.

For example, Order 7 rule 3 of the Supreme Court Rules that applies in Common Law Cameroon is contained in the 1948 Laws of the Federation of Nigeria, volume 10, chapter 211. It may be recalled that at that time Britain treated British Cameroons as part of neighbouring Nigeria and it is through Nigeria that the common law was introduced to English speaking Cameroon. Directions under section 36 (2) of the above Supreme Court Ordinance provided for the division of Nigeria into judicial divisions. There were eight judicial divisions altogether, one of which was the Calabar and Cameroons Province, simply known as the Calabar Division. Order 7 of the R.S.C titled: "Place of contracting and the trial of suits" was therefore meant to provide guidelines for determining the judicial division with the competent territorial jurisdiction in cases where there was such a conflict between these various

⁴³ Order 7 rule 3 of the Supreme Court (Civil Procedure) Rules, 1948 [Cap 211] apply only in common law Cameroon and derives from the laws of the Federation of Nigeria to which Common law Cameroon once belonged.

Articles 8 of the *Code de Procedure Civile* was passed by a law as far back as 21st November 1933. It is therefore clear that these provisions never envisaged the internal conflict of law problem as it is today, this problem having arisen as a direct consequence of the eventual re-unification of the English and French speaking Cameroon.

divisions.

In the same vein, the *Code de Procédure Civile*, of which articles 8 and 9 governs jurisdictional matters in Civil Law Cameroon, was enacted by **Arrete du 16 Décembre 1954** in the then French Cameroons. Article 1 declares it to be a codification of the various decrees *relatifs à la procédure civile et commerciale devant le tribunaux français du Cameroun*. This article makes it clear that these provisions were aimed at jurisdictional conflicts arising exclusively within French Cameroons. In fact, these provisions, though different in content, were meant to perform the same functions as the present Article 42 of the *Nouveau Code de Procédure Civile*⁴⁴ of France, which determines the court with the competent territorial jurisdiction in the case of a conflict between the courts of several judicial divisions within France.⁴⁵

At this point it becomes obvious that the intra-state rules extant in West Cameroon (common law) and East Cameroon (civil law) respectively, reflect an accommodation of interests that are very different from those involved in trans-state jurisdictional conflicts i.e conflicts involving courts or divisions from both law areas. Where the conflict involves courts of the same law area, there is much less at stake since all courts in that law area apply the same law. Any interests involved here are likely to be limited to costs and convenience. Where the conflict involves both law areas, there is a wider range of interest at stake. The applicable law, substantive and procedural, is different, and so is the language. Costs and convenience also come into consideration.

Order 7 and Articles 8 and 9 have the advantage of being flexible thereby giving the courts freedom from the tyranny of fixed and rigid tests. As such they are clearly appropriate in solving problems of territorial jurisdiction within the same law area. Yet, they can become very inadequate when applied to jurisdictional conflicts involving both systems of law operating in Cameroon because they may not

⁴⁴ Dalloz, 1994.

⁴⁵ It provides that the court with the competent territorial jurisdiction is, unless stated otherwise, is the place where the defendant is resident.

appropriately accommodate the wider interests involved in the latter case. That the courts have always applied them to all kinds of jurisdictional conflict is evidence of the failure to take into account the wider interests involved in trans-state jurisdictional conflicts. Any proper solution to this kind of jurisdiction conflict would have to take into account the fact that two systems of law are involved.

The other major objectionable aspect of the current practice is the almost total exclusion of the choice of law question. So far, the quest by the courts for conflict of laws solutions has been to select, exclusively with the aid of intra-state jurisdictional rules, the law of the state or province of the plaintiff's choice, irrespective of how slight or fortuitous it is related to the contract. This, it is submitted, is bad practice, not least because the jurisdictional rules as pointed out above, never envisaged the conflict of laws problem at the time of their enactment. It is significant to note that even in the U.S.A, there has been in recent years, a steadily increasing number of commentators suggesting that such a quest is too limited because rational choice of law decisions frequently cannot be obtained by applying intra-state law of a particular state, regardless of how it is selected, to resolve trans-state controversies.⁴⁶

On the other hand, mention must be made of the fact that in England, the focus in Conflict of laws is shifting away from choice of law, which for so long has been the heart of the subject, and is now increasingly concerned with the issue of jurisdiction.⁴⁷ This is borne out by the line of cases ushered in by the **Atlantic**

⁴⁶ See, Von Mehren, *"Special Substantive Rules for Multi-State Problems: Their Role and Significance in Contemporary Choice of Law Methodology"* (1974) 88 *Hav.L.R.* 347; McDougal IV, Luther, *"Choice of law: Prologue to a Viable Interest Analysis Theory"* (1977) 51 *Tul.L.R.* 207; Trautman, *"The Relation between American Choice of law and Federal Common law"* (1977) 41 *Law & Contemporary Prob.* 107.

⁴⁷ See generally Fawcett, *op. cit.*, note 34, 39; see also Briggs, *"Conflict of Laws: Postponing the Future?"* (1989) 9 *O.J.L.S.* 251, in which he criticises Jaffey's Introduction to the Conflict of Laws, 1988, and Collier's **Conflict of laws**, 1987, for failing to signal this change.

Star,⁴⁸ which created the English doctrine of *forum non conveniens*; and the enactment in the Civil Jurisdiction and Judgement Act 1982 of the Brussels Convention on Jurisdiction and Judgement in Civil and Commercial Matters.

By focusing more on the question of jurisdiction, the English courts have, thanks to the introduction of the doctrine of *forum non conveniens*, been able to stay proceedings in those cases in which litigational convenience and other factors clearly weigh against the English forum. Ironically, the emphasis on jurisdiction in Cameroon is producing the opposite results with courts taking jurisdiction when a stay would be more appropriate.

It is my contention, therefore, that the issue of choice of law must be treated as an essential element in any conflict of laws situation by the Cameroonian courts. Orthodoxy, I am sure, posits the same. The solution to conflict of laws problems should not end at the jurisdictional stage. Any system that places the greatest stress on the jurisdictional question, to the exclusion of choice of law must be rightly considered as having something unattractive about it.⁴⁹

There are sound reasons why the choice of law must also be taken into consideration by the Cameroonian courts when faced with potential conflict of laws cases. The most obvious one is that rules of choice of law and jurisdiction perform different functions. In the Cameroonian context, the function of rules on jurisdiction is to determine which judicial division or place has the competent territorial jurisdiction to try the matter while the function of choice of law rules (which is yet to be formulated) would be to identify the judicial division or place whose law is to be applied. Just as their functions differ, so too are the considerations that should be taken when determining the place of trial and the applicable law. So far, the Cameroonian courts have failed to take any notice of such differences.

Secondly, the absence of choice of law rules only encourages forum shopping.

⁴⁸ *The Atlantic Star* [1974] A.C. 460; *McShannon v. Rockware Glass* [1978] A.C. 795; *The Abidin Daver* [1984] A.C. 398; and *Spilada v. Camsulex* [1987] A.C. 460.

⁴⁹ Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 B.Y.I.L. 111

Choice of law still depends entirely or exclusively on the place of trial. But the place of trial is determined mainly, thanks to the rules on choice of jurisdiction, by what the plaintiff chooses. For example, the jurisdictional rules of both the common and civil law Cameroon allocate jurisdiction to more than one place. Armed with the choice of more than one forum and the knowledge that the court he chooses will apply only the law of the place in which it operates, the plaintiff has every incentive to pick that forum which he considers as offering him the best possible advantages, be they juridical or personal. The practice so far has been for Anglophone plaintiffs to use the freedom afforded them by these rules to bring their actions before Anglophone courts.⁵⁰ There is no doubt that Francophone litigants would do the same. It is surely wrong in principle for the choice of law to be determined by such factors. Factors which have nothing to do with the sort of considerations, such as connections with the alternative jurisdiction, which are relevant for determining the applicable law.

The need for choice of law rules in Cameroon is also important because it will enable the courts to acknowledge or recognise "foreign law" more readily. The recognition, for instance, of civil law by a common law court in a case with relevant connections to the civil law part of the country may be necessary for the following reasons. First, the corollary of the confinement of conflict of laws cases to the jurisdictional issue is that only the law of the place of the court with jurisdiction is applied. This kind of unwavering and inflexible adherence to one system of law can lead to gross injustice. Suppose A and B enter into contract in Bamenda, to be performed in Bamenda. A is resident in Bamenda while B is resident in Douala. B happens to be an illiterate but A has made sure that the contract complies with the *Illiterate Protection Ordinance*, 1948⁵¹ which aims to protect illiterate parties in Common Law Cameroon by requiring that any written document be read and

⁵⁰ See the *Atabong case*, supra, note 38, and *Africauto v. Ngafor*, supra, note 39.

⁵¹ Cap 83 of the Laws of the Federation of Nigeria, 1958. For more on this see chapter 7.

explained to them. Supposing A was later to bring an action for breach against B in the Douala High Court, should B be allowed to avoid this contract on the grounds that the contract did not comply with *Décret No.60/172 du 20/9/1960* which governs the position of illiterates in civil law Cameroon.⁵² Any logical answer must be in the negative but the current practice in Cameroon may not necessarily lead to such an answer. Such injustice could be circumvented by the use of choice of law rules which would undoubtedly point to the law of Bamenda (common law) as the applicable law, thereby denying B the chance of such a blatant escape from his obligation. It has been suggested, at least in the case of the U.S.A, that in such cases, courts should apply the law of the place of contracting if it would permit enforcement of the agreement or if not, the law of the forum if it would permit enforcement of the agreement.⁵³ The Cameroonians courts would do well to adopt such a rule of alternative preference which can be justified on the basis that public policy demands that trans-provincial agreements be enforced to a maximum possible extent, irrespective of whether the parties are resident in the different law areas. But that can only be done if the courts include the choice of law question in the conflict of laws problems.

Also, if the courts are to carry out in a rational manner a policy of entertaining actions in respect of claims arising in the other law area, they must in the nature of things take account of the (different) law of that area. A plaintiff, for instance, claims damages for breach of a contract that was concluded, and was to be performed, in Douala. Under the existing practice, the Anglophone courts are prepared to create and enforce in his favour, a common law right, if he can

⁵² According to the Illiterate Protection Ordinance, it is sufficient that the written contract be read out to the illiterate party but Decree No.60/172 du 20/9/1960 require that such a contract must be written by a notary and then read out to the illiterate party by a sworn independent interpreter. The Francophone courts have been very strict in their observance of this provision as shall be seen in the chapter on formalities.

⁵³ Lorenzen, "*The Statute of Frauds in the Conflict of Laws*" (1923) 32 Yale L.J., 311.

substantiate his case according to the English common law, to the total disregard of civil law. Strictly speaking, however, neither the nature nor the extent of the relief to which he is entitled, nor, indeed, whether he is entitled to any relief, can be determined if the civil law (the law of Douala) is totally disregarded. To consider only the common law, might well be to reverse the legal obligation of the parties as fixed by the law, to which their transaction, both in fact and by intention (more often in fact), was originally subjected. A promise, for instance, made by an Anglophone in Douala and to be performed there, if valid and enforceable by the civil law of Douala, should not be held void by a common law court merely because it was unsupported by consideration. This fact which had long been acknowledged by the English courts in *Re Bonacina*,⁵⁴ has been reiterated by article 8 of the Contracts (Applicable Law) Act 1990.⁵⁵ Again this can only be done if the courts are to have regard to the choice of law question.

5. THE NEED FOR A NEW APPROACH.

As is the case with many other African countries,⁵⁶ the problem of internal conflict of laws in Cameroon is characterised by the lack of proper solutions. But unlike other countries whose legal pluralism is confined to conflicts between customary and western law, the Cameroonian problem is made the more complex by the fact that she also has to grapple with the conflict between two western systems -

⁵⁴ [1912] 2 Ch. 394

⁵⁵ See article 8 of the Rome Convention entitled 'Material Validity'. This article contains 2 provisions: 8 (1) is concerned with the "existence and validity of a contract" while 8 (2) deals with the existence of consent. The intention is that not only are issues of material validity in the English sense covered (e.g. the issue of illegality), but also issues relating to the formation of the contract (for e.g. offer and acceptance and consideration).

⁵⁶ See Vanderlinden, "*A la Rencontre du Droit Internationale Privé Africain en Matière Commerciale*" In: *The Harmonisation of African Law*. 1974, pp. 221-243; with regard to Nigeria, see Agbede, *Themes on Conflict of Laws*. 1989, p. 6.

the civil and the common law. An attempt has already been made in the preceding section to demonstrate that the present system of employing intra-state jurisdictional rules to internal conflict problems involving both law areas are inadequate and must thus be viewed as unacceptable, even though they may occasionally achieve the appropriate results. With the need for a new approach apparent, the problem now becomes one of ascertaining the best method for attempting to satisfy that need.

It is hereby proposed that the solution to the problem of internal conflict of laws in Cameroon lies in the adoption of rules of ordinary (international) conflict of laws. To avoid confusion between internal and international conflict of laws, I shall henceforth refer to the latter by its other name, 'Private International Law'. Before I explain and analyse the relevance of rules of private international law to the internal conflict of laws problem, it is necessary to first of all justify my proposition. It must be conceded that there is nothing revolutionary about this proposed solution. It has already generated much debate in other jurisdictions and divergent views have been expressed as to the relevance of private international law rules in internal conflict problems. Some writers have warned that it is dangerous and fallacious to do so⁵⁷ while others argue that there is clearly an analogy.⁵⁸ Others still, such as Professor Vitta have steered a pathway that is midway between the opinion of those who deny all possibility of considering in common the problems relating to interpersonal conflict of laws and Private international law and those who maintain that the two bodies of the rules are so similar that the rules of private international law can always be

⁵⁷ Allott, *New Essays*, pp.115-116; Tier, "The Relationship between Conflict of Personal Law and Private International Law" (1976) 18 J.I.L.I. 240 et.seq.; Bartholomew, *Op. cit.*, note ,325 et.seq.; Bartin, *Etudes de Droit International Privé*, p. 169, cited in Battifol & Lagarde, *Droit International Privé*, vol.1, 1983, para. 258.

⁵⁸ For example Ph. Franceskakis, "Problemes de Droit International Privé en Afrique Noir Independante" (1964) t.II Rec. de Cours, pp. 275-361; Battifol & Lagarde, *Op. cit.*, note 57, para. 258; Wolff, *Private International Law*, 1950, p. 6; Graveson, *Conflict of Laws*, 1969, p.4; Arminjon, "Les Systemes Juridiques Complexes et le Conflit de Lois" (1949) t.I, Rec. de Cour, p. 45.

applied by analogy.⁵⁹

It is not my intention to settle this controversy here⁶⁰ but my contention, at least on the basis of the internal conflicts of contractual obligations in Cameroon, is to support Vitta's moderate line. In the field of contractual obligations in Cameroon, there is clearly a marked similarity between external and internal conflicts. Because the systems in conflict are the common law and the civil law, the problems involved are not any different from those that may arise between a French and an English party in a given case. Whether the conflict is external or internal, it is the variation of the substantive law which causes the conflict. It is therefore submitted that this similarity be exploited by the courts by applying private international law type solutions to the internal conflict of law problems, at least, in the area of contractual obligations.

Practical support for this approach is not hard to come by. It has already been followed in India and Pakistan, where the courts rely heavily on the doctrines of private international law to solve interpersonal conflicts.⁶¹ But Great Britain provides by far the best example. For the purpose of Public International Law, Britain is treated as a single nation whereas in Private International Law terms, Scotland which operates the civil law is considered a separate country from England. The House of Lords, however, considers appeals from both English and Scottish courts. In the latter case, it applies Scottish Law. The situation in Cameroon therefore bears a canny resemblance to that of Great Britain and there is no reason why like Great Britain, the civil and common law jurisdictions in Cameroon cannot be treated as separate "countries" for the purpose of conflict of laws. The need for a unique Supreme Court (like the House of Lords) does not arise since the present Supreme Court of Cameroon, though based in the civil law part, hears appeal from

⁵⁹ Vitta, "The Conflict of personal Law" (1970) 5 Israel L.R. 170-202 and 337-351.

⁶⁰ This debate seems to me to be more pertinent to the question of interpersonal conflict or the conflict between imported western laws and indigenous laws. There may be a good case for arguing against the use of Private International Law rules to this kind of conflict.

⁶¹ Pearl, *Op.cit.*, note 2, p.97

courts in the common law part. In the same way that the the House of Lords applies Scottish civil law to cases emanating from Scotland, so too does the Supreme Court of Cameroon apply the common law to appeals whose provenance is Common Law Cameroon.

But how can private international law solutions be successfully transposed to problems of internal conflict of contractual obligations in Cameroon. There are several ways in which in private international law can be of especial relevance but I shall focus only on the two main issues of jurisdiction and choice of law. Let me suppose a typical commercial case in private international law, such as an action for damages for breach of contract. The defendant may argue that the proper law of the contract is that of a foreign country, that under that law he is not in breach, and so forth. Yet, if he has wits about him, the defendant has a better starting place than this: to argue that the court has not got (or if it does have, should not exercise) jurisdiction over him and that the action should be stayed. In other words, any private international law solution to the conflict problem starts at the jurisdictional stage. Only after the issue of jurisdiction has been resolved does the court need to consider the question of the applicable law. This approach can be explained with the help of the decision by the West Cameroon Court of Appeal in **Neubeck v. Swiss Air Transport Co. Ltd.**⁶² This was an international conflict (as opposed to internal conflict) case - the supposed conflict was between German and Cameroonian (common) law. The respondent, an air transport company, alleged that on the appellant's instructions they had issued tickets to various persons for which the appellant was refusing to pay. The appellant denied having done any business with the respondents but admitted that he booked passenger tickets through Swiss Air, Munich, Germany when he was resident there. He argued that because he was not resident in Cameroon at the time, the High Court of West Cameroon did not have jurisdiction to try the case. The High Court rejected his application for stay, assumed jurisdiction and went on to determine the case in favour of the respondents.

⁶² Civil Appeal No.WCCA/9/68 (Buea, unreported)

On appeal he further raised a number of points: that the proper law of the contract was German law and that the German law of limitation of action, not the Cameroonian one, applied. Traditional choice of law questions. The West Cameroon Court of Appeal brushed aside his argument that German law applied on the grounds (i) that he had failed to plead it in his statement of defence to the high court and (ii) that he failed to prove that the claim would have been statute barred under German law. His appeal was consequently dismissed.

By summarily dismissing the appeal on the above grounds, the Appeal Court can rightly be accused of judicial escapism. How could the court accuse the appellant for failing to plead that German law applied at the trial court, when at that stage the appellant should normally have been concerned with the question of jurisdiction, as indeed he was. It is only after the question of jurisdiction has been determined that the question as to the applicable law should be addressed. The court was equally reticent on the question of the applicable law, only saying that German law had not been proven, thus leaving open the question as to whether it would have applied had it been proven. It certainly would not have applied in this particular case since the court had been quick to pick on a procedural flaw - that the appellant had failed to raise the issue of choice of law before the trial court. This case is symptomatic of the unease with which Cameroonian courts sometimes confront conflict of laws problem, yet it is significant for revealing that, as confused as they might be, in an international conflict problem, Cameroonian courts may be prepared to consider both the jurisdictional and choice of law issues in their attempt to determine which forum has jurisdiction and the applicable law.

Regrettably, when the conflict is internal, the courts, even though they rightly begin with the jurisdictional issue, always seem content to settle everything at that stage. They never seem to proceed to the choice of law stage, even when there is a clear need for that. Once a court decides that it has jurisdiction, it ignores any possible choice of law question. One may wonder what is wrong with that, but there is something definitely wrong. The present jurisdictional rules in Cameroon, as already demonstrated, were never formulated against the backdrop of conflict of laws

between the civil and common law. It is possible, therefore, thanks to the intra-state jurisdictional rules, for a particular court to have jurisdiction without necessarily being the appropriate forum.

In *SHO/Africauto v. Ngafor*,⁶³ for instance, the Bamenda High Court assumed jurisdiction solely on the basis of the plaintiff's residence. Yet, all the other relevant connections - defendant's residence, place of business, place of contract formation and performance and place of commission of the tort - pointed to Douala (civil law). In upholding the decision of the High Court not to grant a stay, the Bamenda Appeal Court said that unless it was shown that to try the case in any court other than the Douala High Court would result in a miscarriage of justice, that court (Bamenda) had a discretion to try or transfer the case as it thought fit. Dismissing the appeal, the court felt confident enough to declare that no substantial miscarriage of justice had been caused by trying the case in Bamenda and that the procedural irregularity was cured by the trial.

One must say straightaway that it is hard to agree with that conclusion. In refusing to grant a stay the court appears to have been unduly concerned only with the plaintiff's interests. That begs the question whether the same interests of justice do not have it that the defendant ought not to be compelled to submit to litigation in a particular forum if the dispute is clearly more closely connected with another forum, his preferred forum. That is to say, the applicable interests of justice are concerned just as much with where a man is sued as with the law which will be applied when he is sued. No doubt a plaintiff may consider that he has been hard done by when he institutes proceedings only to have them stayed when the defendant successfully pleads *forum non conveniens*; but the plaintiff's are not the only interests to be borne in mind by the court. In the Cameroonian context, it cannot be objected to that an anglophone plaintiff, for instance, obtains an improper advantage when he chooses a common law forum in which the available procedure, law and language suits him nicely, nor should it be much of a sustainable objection that the defendant

⁶³ *Supra*, note 39.

is able to use rules of local law to achieve no more than that litigation takes place in the most appropriate forum for it.

It is for these reasons that I take the view that Cameroonian courts would be better equipped to deal with internal conflict problems if these problems were to be subjected to the private international law regime, since they would more readily recognise the presence of a different system of law to which the case may be more closely connected.

The proposition that Cameroon should be treated as two separate entities for private international law purposes invites the question as to whether the separate law areas shall have to apply their separate rules on conflict of laws. In other words, shall Anglophone and Francophone Cameroon apply the respective English and French conflict of laws rules they are supposed to have inherited.

Ideally, the emphasis should be on new and uniform rules on jurisdiction and choice of law. Inspiration for this can be sought in the recent efforts by the European Economic Community to harmonise conflict of law rules within the community,⁶⁴ as evidenced by the **Brussels Convention, 1968** on jurisdiction and enforcement of judgements in civil and commercial matters⁶⁵ and the **Rome Convention 1980**⁶⁶ which aims to establish uniform choice of law rules for contractual obligations throughout the community.⁶⁷

In relation to the question of jurisdiction, the use of Order 7 rule 3 of the R.S.C. (Common Law Cameroon) and articles 8 and 9 of the *Code de Procédure Civile* (Civil Law Cameroon) should be limited only to intra-common law or intra-civil law jurisdictional conflicts, i.e. the reason for which they were formulated. New

⁶⁴ See Lipstein, ed., *Harmonisation of Private International Law by the EEC*, 1978. This is a collection of proposals in the form of essays for the harmonisation of conflict of laws rules.

⁶⁵ Given effect in the United Kingdom by the Civil Jurisdiction and Judgement Act 1982.

⁶⁶ Given effect in the UK by the Contracts (Applicable Law) Act 1990.

⁶⁷ Para.3 of the Preamble.

jurisdictional rules for conflicts involving both common and civil law courts must be developed. Such rules would have to be of uniform application throughout Cameroon as that would greatly reduce, if not totally discourage forum shopping. In that way the interests of both plaintiff and defendant would be taken into consideration and the plaintiff would only have himself to blame if he chose to sue in a forum from which the defendant may be able to escape.

As for the question of choice of law, it should be determined by the doctrine of autonomy.⁶⁸ This means that the parties should be free to choose the governing law and only in the absence of that, do the courts have to consider the relevant connecting factors to the contract. This flexible approach, which was already being followed by many European Community countries with variations⁶⁹ has been generally adopted by the Rome Convention 1980.⁷⁰ Prior to the coming into effect of the Rome Convention, English law, for example, applied the flexible doctrine of the 'proper law of contract'⁷¹ to determine the applicable law while French law also employed a similar flexible approach.⁷²

It may be of some importance to illustrate how this doctrine can be applied to internal conflict problems in Cameroon by using some Cameroonian cases by way of examples. I shall briefly consider seriatim the situation where the parties have made an express choice, where there is an inferred choice, and where there is no express or inferred choice. The aim will be to prove that Cameroonian courts have in some cases followed the private international law approach to the problem of determining

⁶⁸ Cheshire, North, and Fawcett, p. 458.

⁶⁹ Lando, "*The EEC Convention on the Law Applicable to Contractual Obligations*" (1987) 24 C.M.L.R. 159, 171-179.

⁷⁰ See Article 3, entitled "Freedom of choice."

⁷¹ Cheshire and North, p. 447 ff.

⁷² See the brilliant comparative account by Lando, 3 *International Encyclopaedia of Comparative Law*, chapter 24; Battifol, and Lagarde, *op.cit.*, vol.II pp. 257-311; Loussouarn & Bourel, *op. cit.*, note 27, para. 375-378.

the applicable law of a contract, albeit without having having that in mind.

Where the parties expressly choose the law to govern their contract, the courts should allow that chosen law to prevail. Of course there should be some limits on the parties' freedom to select the applicable law. Firstly, the choice must be, to borrow Lord Wright's phrase, "bona fide and legal" and there must be "no reason for avoiding the choice on the grounds of public policy".⁷³ Secondly, and more importantly, any choice of law should be limited only to either system of law in Cameroon. To allow Cameroonian parties to write into their contract a choice of law provision designating foreign law in a purely Cameroonian transaction is to allow them to free themselves from the power of the law of the land. So extraordinary a power in the hands of individuals is absolutely anomalous and should surely be against public policy.

In practice, however, it is very unlikely for Cameroonians to expressly choose which law to govern their contract. This may be partly due to the fact that people do not generally envisage litigation at the time of contracting and partly due to the ignorance of legal complications that may arise as a result of conflict of laws, if and when a dispute arises. It may also be misconstrued as an indication of future dishonesty. Not too many Cameroonians would be prepared to deal with someone who at the time of contract formation is already addressing his mind to the question of the governing law in the event of a dispute.

In the absence of an express choice of law, the court should consider whether it can ascertain that there was an inferred or implied choice of law by the parties. If the parties agree, for instance, that a court in the civil law area shall have jurisdiction, that is a powerful implication that the civil law should be applied. This was recognised *obiter* by the Buea Court of Appeal in the **Atabong case**⁷⁴ where it was noted that there was no clause in the contract designating Douala as the place of trial in the event of a dispute, the clear implication being that had there been such a

⁷³ In *Vita Foods Product Inc. v. Unus Shipping Co Ltd* [1939] A.C. 277 at 290.

⁷⁴ *Supra*, note 38.

clause, the court would have had little difficulty in upholding it, in which case the Douala court would have applied the civil law. Also, if the parties agree on a place for arbitration, it can be inferred that the law of that place is the applicable law. In **Ste. Neoplan Gottlob v. Ste. Jetliner Cameroun S.A.**,⁷⁵ the parties had agreed that any dispute would be settled by arbitration in Switzerland. The plaintiff eventually brought an action in the *Tribunal de Grande Instance*, Yaounde and the defendant applied for a stay on the strength of the arbitration clause. The court held that the parties were bound by the arbitration clause and granted a stay.

Other factors such as the use of a particular language (French or English),⁷⁶ the nature and location of the subject matter of the contract, the residence of the parties, the head office of the corporation party to a contract, may all help the court to infer the intention of the parties.

Where the parties have not expressed a choice and no such choice can be inferred, the applicable law of their contract should be determined by reference to the system of law with which the contract has the greatest nexus. This has been variously referred to as "the system of law with which the transaction has its closest and most real connection",⁷⁷ the place of "the most significant relationship",⁷⁸ and the "law

⁷⁵ J.C. No.266 du 27 Mars 1991. (Trib. G.I., Yaounde, unreported).

⁷⁶ But the courts must be careful not to read too much meaning in the use of a particular language sometimes. French, for instance, is the dominant language with over two thirds of the population using it. Some official documents are written only in French, so just because an Anglophone may sometimes transact his affairs in French should not necessarily be taken as an acquiescence by him that French would govern the relationship. At times he may simply have no choice. This too applies to a Francophone who may happen to deal in the English out of necessity rather than choice.

⁷⁷ See Cheshire and North, 11th ed., p.463. It is said that it is not clear whether reference should be made to "the law of the country" or the "system of law". In the present Cameroonian context, it clearly has to be with "the system of law" since one is dealing with internal conflicts within one country with two systems of law, rather than with conflict of laws between two separate countries.

⁷⁸ The Restatement of Laws, Second, Conflict of Laws, article 186 (1).

of the country with which it is most closely connected".⁷⁹ The vast majority of contracts in Cameroon fall under this category of no express or inferred choice of law.

In determining the system of law with which the contract is most closely connected, the court should look at all the circumstances. It is difficult to lay down any firm rules but the court should look for such factors as the place of contracting, the place of performance, the place of residence or business of the parties. The case of **Klockner v Cameroun**,⁸⁰ does provide a perfect illumination on how Cameroonian courts should go about the task of determining the applicable law in the absence of an express or inferred choice. The full facts of the case and the judgement are not relevant here. It is enough to say that the dispute arose out of a failed joint venture by Klockner, a German based multinational company, and the Cameroonian government to build a fertiliser plant in Cameroon. The project turned out to be a fiasco and the plant was shut down after a few months of unprofitable and sub-capacity operation. Even though this was not purely a domestic conflict of laws case, the arbitration tribunal (ICSID) raised, and answered, some interesting conflict of laws questions which are very pertinent to the present discussion. After the plant had been closed down, Klockner who had borne most of the construction costs, filed a request for arbitration against the Cameroon, claiming the outstanding balance of the costs of erecting the factory.

Although the parties had agreed on arbitration, they had not chosen the applicable law. Neither could it be inferred. It was therefore incumbent on the arbitration tribunal to determine the applicable law. It might have appeared a simple matter to apply **Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States** (ICSID) which provides that in the absence of a chosen law, "the tribunal shall apply the law of the contracting state

⁷⁹ The Rome Convention 1980, article 4 (I).

⁸⁰ For a detailed discussion, see Jan Paulsson, "The ICSID Klockner v. Cameroon Award: The Duties of Partners in the North - South Development Agreements" (1984) J.Int.Arb., 143-168.

party to the dispute (including its rule on the conflict of law) and such rules of international law as may be applicable."

Indeed, it was not contested that the applicable law should "naturally" be the "civil and commercial law applicable to Cameroonian". However, the tribunal was to discover that as a result of Cameroon's dual heritage, it could not determine the applicable law in Cameroon without difficulty. In effect, the tribunal still had to decide on the system of law (common or civil) in Cameroon by which the dispute was to be resolved. This, the tribunal rightly determined to be that part of Cameroonian law that is based on French law. To arrive at that conclusion, the tribunal was influenced by the following considerations: the doomed factory was located in the French speaking part of the country, and all aspects of the contract were finalised in Yaounde, also in the French speaking part. In other words, French speaking Cameroon was the place both of contract formation and performance. Although the tribunal did not say so, one would be entitled to impute on the tribunal an application of what may be conveniently referred to as the "closest and most real connection test."

It must be a cause of more than mild concern that it has needed an international arbitration tribunal to raise such an obvious Cameroonian problem, and better still, solve it faultlessly. The mere fact that the tribunal was prepared to address the issue of Cameroon's dual judicial system in their disposition of the conflict of laws problem is to be commended. It is hoped that Cameroonian courts would show the same awareness when confronted with an internal conflict of laws situation. This is certainly not asking too much of the courts since it is possible to explain some of their decisions in the context of "the closest and most real connection" test, even though the courts most certainly did not have that test in mind when they made such decisions. I will cite just two examples.

First, in **Salao Liman v. Abanda**,⁸¹ both parties were resident in Bamenda (common law) which was also their place of business. They entered into a contract

⁸¹ BCA/20/83 (Bamenda, unreported)

of carriage in Douala (civil law) whereby the respondent (Abanda) hired the appellant's lorry to transport his goods to Bamenda. The lorry was involved in an accident on the way (at Nkongsamba in the civil law part) and the goods were stolen. In an action in which both parties made claims against each other, the Bamenda High court (and later the Appeal Court) automatically assumed jurisdiction.

Also, in *Nche v. Momolou & 2 others*,⁸² all the parties were resident and doing business in Bamenda. They entered into a contract of carriage in Douala, for goods to be transported to Bamenda. The goods went missing and an action was brought before the Bamenda High Court and later to the Bamenda Court of Appeal, with no protest by the defendants over the jurisdiction of the Bamenda courts.

In both cases, neither the parties themselves nor the court seemed at all bothered by the fact that the place of contract formation was Douala, in the civil law jurisdiction of Cameroon. In the first case, the accident and loss occurred in Nkongsamba (civil law). Yet each time the plaintiff brought their action before the Bamenda court and each time the court took it for granted that it had jurisdiction. It is not suggested that it did not have jurisdiction. The point I am trying to make here is that in those cases that have connections with civil law provinces, it would be preferable for the courts to take that little extra trouble to explain the basis on which they assume jurisdiction (or grant a stay as the case might be), which carries with it the application of the local law. In the above cases, the jurisdiction of the Bamenda court can be easily explained by the fact that all the parties were resident and did business there, and delivery to be made in Bamenda. Besides, had the Bamenda court declined jurisdiction, the parties would have had to travel to Douala for trial at great expense, never mind having to put up with a different language (French), a different legal culture (civil law) and all its different legal paraphernalia.

⁸² BCA/18/82 (Bamenda, unreported).

6. CONCLUSION.

From the foregoing analysis of internal conflict of laws in Cameroon, one may make the following conclusions:

That it is chiefly or solely concerned with the the question of choice of jurisdiction. It is this question of choice of jurisdiction that determines the question of choice of law.

That the statutory provisions that govern the question of jurisdiction in the seperate law areas of Cameroon are inadequate and ill-suited as solutions to problems of conflict between both legal systems.

That despite the importance of the problem, it has so far received very scant attention by the courts and none by the legislature.

In the light of the above, it is proposed that a modernization of the antiquated rules of choice of jurisdiction be embarked upon so as to remove some of the barriers which now stand between the litigant and the substantive law applicable to his case. The most effective way of introducing any changes is by legislation, in which case, some recent legislative enactments of the European Community can be of invaluable help, if only in providing guidelines. Such legislation must strive or aim at formulating new and uniform rules on jurisdiction (as against the present dissimilar ones) and choice of law along the lines of private international law. This, it is hoped, will produce certainty, predictability and uniformity of results.

In the meantime, however, the courts must concentrate their endeavours in areas that are peculiarly theirs, i.e. be prepared to acknowledge and deal with any problem or potential conflict problem in a manner that reflects the interests of all parties concerned. The courts should desist from the present attitude whereby technical points for disposing a case are invariably seised upon, when the merits should have been more fully explored. They should strive to understand the increasing interaction between Cameroonians of both legal systems in matters of private law in general and contracts in particular, and seek to penetrate some of the resulting manifestations of legal relativism.

For my part, I note as a fact that there does exist an internal conflict of laws problem with regards to contracts in Cameroon. It is time for these problems to be accepted for what they are: real problems, arising or capable of arising out of actual circumstances. Although many examples in purely contractual matters have not been provided here, it should not in any way detract from the issue. That is better explained by the ignorance of the parties, the failure of counsel to plead 'foreign' law (in the sense of the other law in Cameroon other than that of the place of the court), and the courts unacceptable reluctance to confront the conflict problems. Even when counsel are aware that a particular case does have several connections with the other legal system as to bring it within the conflict regime, they are still prepared to have it treated as a local case, usually for sound tactical reasons.⁸³ It can be safely projected that with the increasing fluidity and frequency in the movements of individuals across unguarded legal boundaries within Cameroon, the problem of internal conflict of laws is bound to assume a greater prominence, in the future than it has been accorded in the past.⁸⁴

⁸³ If they were to successfully raise the conflict problem, the court may be moved to grant a stay. This would mean a transfer of the case to the courts of a different legal system whose laws - substantive and procedural - they may not be familiar with. As a result, the majority of Anglophone lawyers generally avoid the civil law courts just as much as their Francophone confrères dread going before a common law court.

⁸⁴ Recently, the muddled state of internal conflicts of laws in Cameroon was the subject of a brief but perceptive comment by Nkweatta Muna, C.B., *Op.cit*, note 6.

CHAPTER FOUR.

THE NATURE AND STRUCTURE OF CONTRACTS IN CAMEROON.

It has already been explained how as a result of Cameroon's colonial and legal history, contract law in Cameroon today is largely a reflection of the English Common Law and the French Civil Law respectively. In the preceding chapter it was demonstrated how these "imported" laws have come to "triumph" over Cameroonian customary law and how they have come to be regarded as stating the law of contract in Cameroon.

In this chapter, the nature and structure of contracts in Cameroon is explained. The aim is to provide an overall picture of modern contract law. This task will entail a consideration of such preliminary issues as the definition and classification of contracts, the distinction between civil and commercial contracts, and the particularly troublesome regime of *contrats administratifs*. This exercise is significant in that the nature and structure of contracts is different under the common law and the civil law and it will be of interest to determine the extent and effect to which such differences are reflected in Cameroon.

1. THE DEFINITION OF CONTRACT.

In this section, it is proposed to look briefly at the traditional common law and civil law definitions of contract law, if only to distinguish contracts from other forms of legal obligations. Considering that in these systems the idea and the notion of contract are not exactly the same, it is difficult to achieve a common definition of contract for both of them, particularly in connection with the notion of promise. In

fact, it has even been suggested that such a definition is impossible.¹ It is convenient, therefore, to treat common law separately from civil law.

In Common Law Cameroon, neither the courts nor the legislature have ever bothered to define the term contract. The most obvious explanation for this is that they must have taken it for granted that the general common law definition of contract applies in the common law jurisdiction of Cameroon.

Yet, contract has been variously defined at common law and the meaning of contract is no more fixed and interchangeable today than it has been in the past.² Writers have defined it either in terms of agreement or promise or a combination of both.³ A third statement in some definitions is that contracts create rights *in personam* rather than rights *in rem*.⁴

Definitions in terms of agreement can be traced as far back to St. Germain's Doctor and Student in the sixteenth century,⁵ through to Blackstone,⁶ and to recent writers like Cheshire and Fifoot,⁷ and Treitel,⁸ who defines contract as "an agreement giving rise to obligations which are enforced or recognised by law".

¹ Alpa, "*Le Contrat Individuel et sa Definition*", (1988) R.I.D.C., 327 at 333.

² Jackson, "*The Scope of the Term 'Contract'*", (1937) 53 L.Q.R., 525.

³ For examples of those who include agreement in their definitions while also referring to promises in the alternative, see Beale, Bishop, and Furmston: *Contract Cases and Materials*. 1985, p.3; James, *Introduction to English Law*. 11th ed. 1985, p.267.

⁴ Coote, "*The Essence of Contract*" (1988) 1 J.C.L. 94.

⁵ The history of the usage is traced in Jackson, *op. cit.*, note 2, 526.

⁶ 2 Commentaries, (1776), p.442.

⁷ Cheshire, Fifoot and Furmston, *Law of Contract*, 1991, p. 27.

⁸ Treitel, *The Law of Contract*, 1991, p. 1.

On the other hand, Pollock⁹ and the American Restatement of the Law, Second, Contracts define contract in terms of promise. Section 1 of the latter provides that "A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognises as a duty".

Both the agreement and promise analyses of contract have their critics. Against the agreement analysis, for instance, it is said that it excludes those contracts which are not agreements, whereas such contracts can actually be made at common law by the use of a deed. It is also argued that the fact that agreement in this sense is not necessarily a contract,¹⁰ but is an essential element in every contract, creates certain difficulties. Cases of fraud and mistake have been cited as examples of situations where it would be difficult to see anything that could properly be called agreement because the minds of the parties are not *ad idem*.¹¹

In favour of the promise analysis, it is said that it is wide enough to cover contracts which are not the subject of agreement. Against it is the assumption that promises must involve the doing (or refraining from doing) some act in the future,¹² the implication being that there could, *prima facie*, be no place in contract for a warranty, for example, the essence of which is a statement of past or present fact rather than the promise of something to be done in the future. Atiyah maintains, however, that past or present fact can be the subject of a promise.¹³ It is submitted that the arguments for and against both analyses of contract are complex and varied

⁹ Pollock, *Principles of Contract*, 1889, p. 1; Fried, **Contract as a Promise: A Theory of Contractual Obligations**, 1981.

¹⁰ For a discussion of agreements not amounting to contracts, see *Balfour v Balfour* [1919] 2 K.B. 571 at 578; *Rose Frank & Co. v. Crompton Bros.* [1923] 2 K.B. 261.

¹¹ Jackson, *op. cit.*, note 2, 525.

¹² For example, Peetz, "Promises and Threats" (1977) *Mind* (NS) 579; Stoljar, "Promise, Expectation, Agreement" (1988) *C.L.J.* 193.

¹³ Atiyah, "Promises and the Law of Contract" (1979) 88 *Mind* (NS) 410.

and need not be exhaustively considered here. The fact of the matter is that for many hundred years the orthodox theory of English law has regarded contractual liability as based upon the agreement of the parties, or upon the promises of the parties. No distinction of any importance has been drawn from these two views: agreement or promise has been the basis of contract law.¹⁴

In Civil Law Cameroon, there is no problem in finding the definition of contract. The Civil Code defines contract in Article 1104 as "an agreement by which one or more persons obligate themselves to one or more other persons to give, or to do or not to do, something". The agreement (*convention*) is the accord of two or more parties on a subject matter of legal interest. Agreements may have as an object not only the creation, but also the modification and extinction of obligation. However, the label contract is applied traditionally to those agreements designed to create or promote an obligation.¹⁵ Unlike the common law, the identification of contract solely in terms of agreement is unanimously adopted in Civil Law Cameroon and France,¹⁶ even though it has been argued by one observer that the definition should have included "*cause*" which is also a necessary ingredient for the validity of contracts.¹⁷

It is not necessary, for the purpose of this thesis, to fix the limits of contract or to declare in favour of either the agreement or promise analysis, since I do not

¹⁴ See Atiyah, "*The Binding Nature of Contractual Obligations*" In: Harris and Tallon (eds.), **Contract Law Today: Anglo-French Comparisons**, 1989, p. 21.

¹⁵ 6 Planiol & Ripert: **Traité Pratique de Droit Civil Français- Obligations- Part 1**, 17 (2nd ed., Esmein 1952); Rouhette, *Loc. cit.*, note 16, p. 65.

¹⁶ Rouhette, "*La Définition du Contrat et la Méthode Juridique Française*", In: **DROITS- Revue Française de Théorie Juridique**, vol. 12, **Le Contrat**. 1990, p. 60.

¹⁷ Monateri, "*Règles et Technique de la Définition dans le Droit des Obligation et des Contrats en France et en Allemagne: La Synecdocque Français*" (1984) R.I.D.C. 7-52.

consider the question to be whether one view is correct and the other wrong. In terms of consistency and convenience, definitions based on agreement have the advantage of being centred on an incident of the vast majority of contracts whether under the common law or under the civil law system in Cameroon. In that sense, they correspond with popular perceptions of what contracts are about.

In conclusion, it is sufficient to note that what is generally regarded as a contract, or what, in other sections of the Civil Code,¹⁸ is stated to be a contract, will be without effect unless it has "consideration", (in the case of Common Law Cameroon) or a "lawful cause" (in the case of Civil Law Cameroon). Cameroonian courts generally do not have much difficulty in deciding whether a matter relates to contract. Even in the common law jurisdiction where no particular definition has been adopted, there seems to be a sufficiently common core on the meaning of contract.

2. CLASSICATION OF CONTRACTS.

In Cameroon, contracts are classified into a number of categories following the traditional civil and common law patterns. And in classifying contracts the common and civil law use widely different terminology. Only an outline treatment will be undertaken here.

In Francophone Cameroon, the Civil Code classifies contracts according to certain characteristics that appear as dominant features, such as the existence or non-existence of reciprocity of engagement, the introduction of a certain chance that a certain event will or will not take place or that each of the parties has contemplated a counter-prestation by the other. Along this path, the established classification of contract under civil law has emerged as follows:

¹⁸ Some examples of transactions declared in the code to be contracts are: gifts *inter vivos*, accepted by the donee (art.755), sale (art.1472), exchange (art.1596), lease (1600), etc..

Synallagmatic (bilateral) and Unilateral;¹⁹
 Commutative and Aleatory;²⁰
 Gratuitous and Onerous;²¹ and
 Nominate and Innominate.²²

Such an elaborate classification is not known in Common Law Cameroon which, like other common law jurisdictions, has devoted little attention to the classification of contracts. For example, no distinction is made between commutative and aleatory contracts at common law. It has been said that this distinction could well be made at common law but for the fact that the notion of *lesion*, which explains the inclusion of this distinction in the Civil Code, is not known to English law.²³ The common law also does not distinguish between onerous and gratuitous contracts. Only onerous contracts are considered as valid contracts because they fulfill the requirement of consideration. This does not mean that in Common Law Cameroon, gifts are not recognised or that the courts will not give effect to them. The point is that, like English law, gifts and promises are not considered as contracts. Rather they are considered as unilateral acts which are governed by certain well laid down rules and they are generally considered to fall under property law instead of contract law since their object is to transfer some property and not to create any obligations.

The most significant classification in common law is that which divides contracts into bilateral and unilateral.²⁴ It will have been noticed that the civil law also makes

¹⁹ Art. 1102 -1103.

²⁰ Art.1104, this is also referred by some common law writers as 'Dependent and Independent Obligations', see Carter: **Breach of Contract**, 1984, p.6.

²¹ Art. 1105 - 1106.

²² Art. 1107.

²³ David and Pugsley: **Les Contrats en Droit Anglais**. 1985, p. 62.

²⁴ Langdell, **Summary of Contracts**, 248-253, 2d ed. 1880, is credited with having first enunciated this distinction. See Stoljar, Loc. cit., note 25. Llewelyn, "*Of the*

a similar classification, yet it is important to point out that there is some terminological difference between common law and civil law with regards to the terms 'unilateral' and 'bilateral' as they relate to contracts. At common law, a unilateral contract is one in which there is a promise of performance by one party only, conditioned by the performance of an act by the other party.²⁵ At civil law, the same term is used in a somewhat different sense - it refers to those contracts which typically produce legal obligations only on one party, e.g. a contract of donation.

The common law generally adopts a very simple classification of contracts which is unknown to civil law. In Anglophone Cameroon, contracts can be classified into contracts under seal and simple contracts, i.e. formal and informal contracts.

A contract under seal, sometimes referred to as a contract of specialty (e.g. a deed) is a written instrument to which a person attaches his seal, delivers it to another person and liability is thereby incurred under it by the person who fixes his seal. It is the form of the contract that secures its validity. Consideration, is not essential to the creation of a contract under seal. I do not know of any Cameroonian cases involving the formal validity of the sealed obligation but I suspect that Cameroonians have not only not had seals, they have not had or have not used wax as well. One can only assume that in Cameroon, the role of the sealed instrument is performed by other substitutes such as a written document that is duly notarized, i.e. drawn up by a solicitor or notary, or duly registered with the Department of Stamp Duty and Registration, for instance.²⁶ In any case, this work is not concerned with formal

Good, True and Beautiful in the Law" (1953) 69 L.Q.R. 485, 500, has suggested that Langdell formulated this distinction only to achieve some symmetry in the welter of contractual principles.

²⁵ For some discussion of the unilateral contract of the common law, see Llewelyn, *Our Case-Law of Contract: Offer and Acceptance*" (1938, 1939) 48 Yale L.J. 1, 779 *passim*; Stoljar "The False Distinction between Bilateral and Unilateral Contracts" (1955) 64 Yale L.J. 515.

²⁶ See chapter 7 below on formal requirements in contracts.

contracts.

A simple contract is an ordinary contract which may be written or oral. The essential requisite of a simple contract is that it must be founded on consideration. The main characteristic of simple contracts is their foundation on agreement and consent. Unlike contracts under seal which may be quite unilateral in character, a simple contract is always bilateral. This study is in the main concerned with simple contracts. For the purpose of this thesis, therefore, the most important civil law category is that of the synallagmatic contract. This is a contract which is not only bilateral (in the sense that each party undertakes an obligation) but has the characteristic that the performance promised by one party is to be exchanged for another.

3. CIVIL AND COMMERCIAL CONTRACTS.

Francophone Cameroon has followed in the French tradition by making a fundamental distinction between civil law (and civil contracts) and commercial law (and commercial contracts).²⁷ This distinction is not easy to explain in any simple proposition but it suffices to say that commercial law applies in principle to commercial transactions (*actes de commerce*) of which the Cameroonian *Code de Commerce* contains a list (for example, contracts of sale, if the subject matter is bought for resale, banking, brokerage and discount operations, etc) and it applies to other transactions entered into by merchants, (who are defined as those who make it their profession to engage in *actes de commerce*),²⁸ provided that the transactions are accessory to their commercial activities. The *Code de Commerce* governs all such acts.

²⁷ For commercial and civil contracts in France, see generally Dutilleul and Delebecque, *Contrats Civils et Commerciaux*, 1993, especially para. 19 which refers to the position in England and other countries.

²⁸ Code de Commerce, Art. 1.

In Common Law Cameroon, the term commercial law, if used at all, is merely for the purpose of convenience of exposition. It signifies those branches of law, known as "Mercantile law", comprising such important business contracts as sale of goods and agency. But there is generally no difference between the principles of law that apply to business and non-business contracts, neither is there any separate body of rules for commercial transactions, except perhaps for those special laws and decrees that regulate activities such as banking and insurance. The position in Common Law Cameroon simply reflects that in England from which it derives.²⁹

It is submitted, however, that the difference between the civil and common law on this issue is largely academic in Cameroon. This is because even in France where the distinction derives, the only consequences are to be found in the difference in jurisdiction and the simplified procedure of the commercial courts (*tribunaux de commerce*), where there is readier admission of oral evidence. But in Civil Law Cameroon, where the distinction is adopted, there are no separate commercial tribunals, which means that the ordinary civil courts³⁰ entertain what would otherwise be a commercial contract. It is true, at least in principle, that the requirements of proof can be less stringent in the case of commercial contracts, for example, the admission of oral evidence, but in practice the difference is not too visible since the law requires most of these commercial contracts to be in writing.³¹

The main difference from my research is that in cases involving commercial or business contracts, the courts in Civil Law Cameroon will consult the *Code de Commerce* while those in the common law jurisdiction will consult the 1893 Sale of Goods Act, for example, or any other relevant statute or standard textbook on the given area.

²⁹ See Goode, *Commercial Law*, 1984, pp. 35-36.

³⁰ The courts in Francophone Cameroon all have the *Chambre Civile et Chambre Commerciale* (Civil and Commercial Division) fused into one.

³¹ For more on the writing requirement, see chapter 7.

Some eminent French writers have questioned the need for the distinction between civil and commercial contracts.³² In some civil law jurisdictions, notably the state of Louisiana, it is said that the gap between the two is narrowing down.³³ Some African countries that inherited the distinction from France have since abolished it.³⁴ Be that as it may, the distinction is firmly entrenched in French law and there are many French writers who still support it.³⁵ In England, there does not seem to be any calls from English commercial lawyers for a commercial code, except for Professor Roy Goode who, it has been said,³⁶ has spoken for the need of a commercial code as self evident.

³² E.g. Leon Mazeaud, "*Vers la fusion du droit civil et droit commercial français*" In: Rotondi, ed., *L'unité de droit des obligations*, 1974, p. 333; Houin, "*Droit civil et droit commercial en France*" In Rotondi, p. 187.

³³ Kozolchyk, "*The Commercialisation of Civil Law and the Civilization of Commercial Law*" (1979/80) 40 Louisiana L. R. 3.

³⁴ See Decottignies, "*Reflexions sur le Projet du Codes Sénégalais des Obligations*", (1962) 72 Pennant 497, 502.

³⁵ E.g. Tallon, "*Réflexions Comparatives sur la distinction du droit civil et du droit commercial*" In: *Etudes Jauffret*, p. 649 et s.; Hamel, Lagarde and Jauffret, *Droit Commercial*, t. 1, 1980, para. 5.

³⁶ By Lord Goff of Chievely, "*Opening Adress to 2nd Annual Journal of Contract law Conference in London on 11th Sept., 1991*" (1992) 5 J.C.L. 1, 3.

4. CIVIL AND ADMINISTRATIVE CONTRACTS.³⁷

(1). Conceptual Differences between English and French Law.

Modern governments are increasingly being required to enter into contractual arrangements in their usual course of business. To acquire necessary goods and services, public administration must enter into contracts of procurement, to provide public services and amenities such as the running of public transport and public museums, to carry out major public works, the administration must resort to contractual arrangements, either bilateral or multilateral. In these, the individual supplier, public works contractor, public utilities user, etc., must be included in the process through which the administrative act - the conclusion of a joint transaction of both parties - is done.

The French legal system admits of two separate contractual regimes, namely: *contrat de droit civil* and *contrat administratif*. These two contracts, are as concepts, totally distinct and so too are the substantive laws that apply to them. Administrative contracts are governed by rules of an autonomous administrative law running parallel to private law, which governs ordinary civil contracts. Further still, the French have also developed a separate administrative jurisdiction, distinct from the civil one. It consists of administrative tribunals³⁸ which have exclusive jurisdiction over administrative contracts.

³⁷ The term civil contract as used here denotes a contractual form whose essential features derives from private law (civil or common law) and it is conveniently used here as an anti-thesis to administrative contracts: a contractual form shaped by rules of administrative law.

³⁸ See Remington, "The Tribunaux Administratif: Protector of the French Citizen", (1976/77) 51 Tul.L.R. 33; Schwartz, "Administrative Courts in France", (1951) 29 Can.B.R. 380.

In sharp distinction to French law, English law has, or so it is said, no separate theory of administrative contracts;³⁹ neither does it admit of the private-public law dichotomy.⁴⁰ Dicey's rule of law theory is too well known to need any discussion here.⁴¹ In any case, the central theme is that, the control of administrative action must be maintained through the same institutions that administer the ordinary laws of the land, and on the same fundamental principles of justice. This is considered to be the basis of the rule of law in the common law world and its absence in the French system led to Dicey's well-known criticism of the *Droit Administratif*.⁴² Dicey insisted that only law courts must determine questions of administrative law, and the applicable principles must be those that have been worked out from the ordinary private law by the method of judicial empirism.

There has been increased jurisprudential and doctrinal criticisms of Dicey's classical views over the years. More recently, it has been suggested that the United

³⁹ See generally, Langrod, "Administrative Contracts: A Comparative Survey", (1954/55) 3-4 A.J.C.L. 335; Mewett, "Theory of Government Contracts", (1957-1760) 5 Mcguill L.J. 233; Arrowsmith, "Government Contracts and Public Law", (1990) 10 Leg. Stud. 231; Phillips, and Jackson: **Constitutional and Administrative Law**, 1987, p.678.

⁴⁰ See Mitchell, "The Causes and Effects of A System of Public Law in the United Kingdom" (1965) Pub.L. 95; Beetz, "The State of Public Law in the United Kingdom" (1966) I.C.L.Q. 133; Harlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) M.L.R. 241 and the response to that by Samuel, "Public and Private Law: A Private Lawyers Response" (1983) M.L.R. 558.

⁴¹ For a discussion and defence of Dicey's views, see Lawson, "Dicey Revisited" (1959) 7 Political Studies, 112-120.

⁴² Dicey: **Introduction to the Study of the Law of the Constitution**; (10th edn. by E.C.S Wade) London, 1961.

Kingdom would do well to adopt a system similar to the French,⁴³ and set up a separate administrative jurisdiction,⁴⁴ or alternatively, an Administrative Division of the High Court.⁴⁵ It has been forcefully argued that government contracts should not be excused from the field of public law.⁴⁶

Some members of the judiciary too have been known to express the desire for some special kind of framework. As far back as 1956, Lord Devlin was able to say that,⁴⁷

"I believe it to be generally recognized that in many of his dealings with the executive the citizen cannot get justice by process of law. The common law has now, I think, no longer the strength to provide any satisfactory solution to the problem of keeping the executive, with all the powers which under modern conditions are needed for the efficient conduct of the realm, under proper control."

Echoing those sentiments Lord Reid was later to observe,⁴⁸

"We do not have a developed system of administrative law - perhaps because until recently we did not need it, so it is not surprising that in dealing with new types of cases the courts have had to grope for solutions and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed or intended to deal with"

He thus recognised in the same breadth both the absence and the need for some special regime for administrative law.

Of the recent judges, Lord Diplock always expressed a desire to keep English

⁴³ See generally, Mitchell, *op. cit.*, note 40, 94.

⁴⁴ Mitchell, "*Administrative Law and Parliamentary Control*" (1967) 38 Political Q. 360, 370.

⁴⁵ Garner, "*Public Law and Private Law*" (1978) Pub.L. 230, 237.

⁴⁶ For e.g. Arrowsmith, *op. cit.*, note 39, 232.

⁴⁷ "*The Common Law, Public Policy and the Executive*" (1956) 9 C.L.P. 1, 14.

⁴⁸ *Ridge v Baldwin* [1964] A.C 40 at p.72, cited in Mitchell, *op. cit.*, note 40, 117.

(administrative) law in a moving relation with developments elsewhere, especially in the continent of Europe.⁴⁹ His interest in French administrative law is clearly evident in *O' Reilly v. Mackman*,⁵⁰ in which he attaches some powerful generalisations to the distinction between public and private law to the terms of **R.S.C. Order 53**.

Finally, Lord Woolf has been most forthright. He has been unswerving in his view that,⁵¹

"the distinction between private and public law needs to exist because public law requires the court to perform a different role from that which it has traditionally adopted in private law disputes".

Nevertheless, inspite of these calls, in English law, with limited exceptions, there is no special corpus of rules governing contracts involving the government or public authorities.⁵² In fact, in Britain and other common law jurisdictions, the perception of contract, including those in which the administration is a party, as purely a matter of private law is still being emphasised by the fact that (i) the courts are generally reluctant to apply substantive principles of judicial review to the exercise of contractual power by the government,⁵³ on the grounds that a mere contractual power is unreviewable⁵⁴ and (ii) the (English) public law institution of the Ombudsman has most contractual matters excluded from his jurisdiction.⁵⁵

I have stated the conceptual differences between English and French law on the

⁴⁹ Wilberforce, "*Lord Diplock and Administrative Law*" (1986) Pub.L. 6.

⁵⁰ [1983] 2 A.C. 237.

⁵¹ Woolf, "*Public Law - Private Law: Why the Divide ? A Personal View*" (1986) Pub. L. 220; He also reiterates his views in "*Judicial Review: A Possible Program For Reform*" (1992) Pub. L. 221.

⁵² Wade: **Administrative Law**, 1982, p.678.

⁵³ Arrowsmith, "**Judicial Review of the Contractual Powers of Public Authorities**" (1990) 106 L.Q.R 177.

⁵⁴ Arrowsmith, op. cit., note 39, 238.

⁵⁵ Arrowsmith, op. cit., note 39, 240.

subject of administrative contracts. No attempt will be made here to explain or discuss the substantive rules of administrative contracts.⁵⁶ What I propose to do instead is to examine the juridical nature of administrative contracts in Cameroon. Is it an ordinary contract, governed by the rules of private contract law or is it a concept apart and distinct from the contract of private law. Until 1965, there was neither any distinction between civil and administrative contracts nor any separate jurisdiction for administrative matters of any kind in Anglophone Cameroon. Contract was treated purely as a matter of private law, irrespective of the parties involved. Francophone Cameroon, on the other hand, had adopted the French system right from independence.⁵⁷ In 1961, the Federal Court of Justice was created in Yaounde, and one of its five distinct functions was to preside over administrative litigation.⁵⁸

By **Law No.65/LF/29 of 19 November 1965** (on the reform of administrative litigation), an administrative chamber of the then Federal Court of Justice was created in Buea⁵⁹ (which was the main seat of the courts in Anglophone Cameroon at the time) and it assumed exclusive jurisdiction in disputes involving the administration,

⁵⁶ For some discussion on that, Brown and Bell, **French Administrative Law**, 1991, pp. 192-200.

⁵⁷ For the introduction and reception of the French system of administrative law in Cameroon, see Jacquot, "*Le Contentieux Administratif au Cameroun*" (1975) 7 Rev. Cam. Dr., 16-21; Bipoum Woum, "*Recherches sur les aspects actuels de la réception du droit administratif dans les Etats d'Afrique Noir d'expression Français: Le cas du Cameroun*" (1972) no.3 R.J.P.I.C. 359-387.

⁵⁸ See Art. 33 of the 1961 Constitution and Ordinance No.62/OF/6 of 4th October 1961.

⁵⁹ Binyoum, "*Bilans de 20 ans de Jurisprudence Administratif de la Cour Suprême du Cameroun. 1^{re} Partie 1957-65*" (1978) nos. 15 & 16, Rev. Cam. Dr., 23.

including contracts.⁶⁰ The system in Francophone Cameroon was thereby extended to Anglophone Cameroon, with the result that the latter departed from its common law tradition in this respect. There is, therefore, a distinct regime of administrative contracts applicable in the whole of Cameroon. It is modelled on the French regime of *contrat administratif* and like in France, it is governed in important respects by a different legal regime (*contrat de droit commun*) from that of civil contracts.

For present purposes, I am not interested in any discussion as to the respective merits of the English or French system or whether the French system⁶¹ adopted in Francophone Cameroon should have been extended to Anglophone Cameroon. It seems true to say, from the lack of agitation in academic circles and from personal experience and observation, that Cameroonian administrative law commentators and writers (who are mainly Francophones), appear to be in favour of the French inspired separate regime for administrative contracts in Cameroon.⁶² The crucial question, however, is whether that system has functioned as satisfactorily in Cameroon as it has done in France. Even those who feel that the public/private law division is a useful one admit that it has not always been easy for Cameroonians to draw the dividing line

⁶⁰ See Nguini, "*La Cour Fédérale de Justice*" (1973) Pennant, 337-348. During the era of the Federal Republic of Cameroon, the Federal Court of Justice was the administrative court in Cameroun. It was abolished in 1972 and the administrative jurisdiction today lies exclusively in the Administrative Chamber of the Supreme Court.

⁶¹ For a debate on the respective merits of both systems, see Mitchell, *op.cit.*, note 40; Hogg: **Liability of the Crown**, 1989, pp.1-3; Harlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) M.L.R 241; Samuel, *op.cit.*, note 40, 558.

⁶² See generally Kamto, **Droit Administratif Processuel du Cameroun**, 1990; and Owona, **Droit Administratif Spécial de la République du Cameroun**, 1985.

between these allegedly distinct areas.⁶³

In relation to contracts, I shall now focus on what I consider to be the two main issues involved, namely:-(i) the fundamental problem of finding a suitable criteria for delimiting the respective domains of public and private contracts and (ii) the problems relating to the judicial organisation of administrative litigation in Cameroon. The former issue has been particularly troublesome even in France.⁶⁴

(2). Administrative Contracts Determined.

A fundamental characteristic of the administrative contract is that it presupposes an inequality of interest between the parties (since one of them represents the public interest) with the consequence that the consensual character of the contract is substantially qualified by the attribution to the public authorities of powers whose true basis is public policy rather than the agreement of the parties. Public authorities, however, are free to use either the administrative contract or the civil contract in transactions with private persons.⁶⁵ In respect of any such transactions, a preliminary question of classification has to be resolved, in order to determine which legal regime governs the contract. If the contract complies with the rules for the determination of an administrative contract, it will be governed by the rules of administrative contracts and subjected to the jurisdiction of the administrative courts. If the contract does not comply with the rules for the determination of administrative contracts, it is a civil contract and will be governed precisely by the same rules as any contract made between private persons. It must be said that in Cameroon, as

⁶³ See, Kamto: *op.cit.*, note 62, p. 25.

⁶⁴ Drago, "*Paradoxes sur les Contrats Administratifs*", *Melanges Flour*; Weil, P, "*Les Criteres du Contrat Administratif en Crise*", *Melanges Waline*, p. 831.

⁶⁵ Rivero: *Droit Administratif*. 1977, p.111.

shall be seen later, such fictitious splitting of the nature of administrative activities - into public and private - is a myth because the administration never is on equal terms with individuals defending private interests. In French law, a contract can be classified as administrative either by statutory or judicial determination.

(a) ~~Statutory~~ **Statutory Determination.**

An administrative contract is statutorily determined where there is some statutory provision that defines a contract as administrative or expressly assigns it to the jurisdiction of the administrative courts.⁶⁶ Such contracts are known as administrative contracts by statutory determination (*contrats administratif par détermination de la loi*), the inference being that they are governed by public law.

The relevant statute in Cameroon is the **Decree No. 79/35 of 2/2/1979** (governing public sector contracts). Article 1 (i) defines a public sector contract as,

"a written agreement concluded under the the conditions laid down in this decree, by which a person who is governed either by public or private law, enters into an agreement with the state, a local authority or a public establishment to carry out any work on its behalf or under supervision or to supply it with goods or services, in return for a sum of money".

On the question of jurisdiction, article 133 provides that

"the administrative bench of the Supreme Court shall have jurisdiction in all cases in litigation concerning contracts subject to the provisions of this decree."

It is clear from the definition above that at least one of the parties to a contract must be the state or a public body for it to be classed as administrative.⁶⁷

⁶⁶ Laubadere: **Traité de Droit Administratif**, tome 1, 1984, p. 387.

⁶⁷ For the French position, see Prevost, "A la Recherche du Critère du Contrat Administratif: La Qualité de Contractants" (1971) R.D.P. 817.

(b) Judicial Determination.

Legislative or statutory determination apart, the *differentia specifica* between administrative contracts and those to which the public administration is a party on equal terms with the individuals (civil contracts) may be determined by the criteria developed by the courts and by doctrine,⁶⁸ i.e. by judicial determination.

Essentially, there are two main criteria that the courts apply. I shall refer to them as the "exorbitant clause" criterion and the "object of the contract" criterion.

The exorbitant clause criterion derives from, and stresses the administration's freedom to employ the form of contract and the contractual terms that it considers appropriate to the particular transaction. According to this criterion, a contract is to be classed as administrative if its terms include "*clauses exorbitant de droit commun*" (exorbitant clauses or clauses deviating from private law). These are contractual clauses that invest the parties with rights and obligations not normally assumed by private parties in their mutual contracts of a similar kind. For example, a clause which empowers the administration but not the private party, to vary or rescind the contract. While such a provision may be normal in public contracts, it will be anomalous in any other contractual context. It should be noted that contracts between public bodies of a commercial or industrial nature and users or consumers of their products belong to the realm of private law, even if they contain exorbitant clauses. That explains why litigation arising out of contracts of adhesion involving the National Water Corporation (S.N.E.C) and the National Electricity Corporation (S.O.N.E.L) are subjected to the jurisdiction of the ordinary courts. Some commentators in France have claimed that the use of the exorbitant clause criterion

⁶⁸ Judicial criteria are very important here because unlike other areas of French law, *Droit Administratif* is largely judge-made and uncoded.

is in decline⁶⁹ and that it now plays only a subsidiary role⁷⁰ while others have argued that the decisions of the courts do not support such a claim.⁷¹ In the case of Cameroon, one should be able to say, on the basis of the 1979 decree on administrative contracts, that this criterion now plays a less than central role in the determination of administrative contracts.

The second criterion is founded on the object of the contract. By this criterion, a contract is classified as administrative if the effect of its provisions is to admit the contractor to a direct participation in the execution of a public service, as opposed to merely the making of a contribution to its performance. This criterion was authoritatively confirmed by the decision of the French Conseil d'Etat in the famous case of *Epoux Bertin*.⁷² In that case, the plaintiff entered into a contract with the French Ministry in charge of ex-servicemen and victims of war whereby he was to cater for Soviet refugees (waiting to return to the Soviet Union) at a repatriation centre. It was held that since the object of the contract (to ensure the effective repatriation of refugees) was the performance of a public service, it must be classified as an administrative contract and that there was no need to find out whether there were any exorbitant clauses in the contract.⁷³

⁶⁹ Gaudemet, "*Revue de Jurisprudence Administrative*" (1982) R.D.P. 530; Lamarque, "*Le Déclin de la Clause Exorbitante*", In *Melanges Waline*, t.11, (1974), p. 497.

⁷⁰ Odent, *Cours de Contentieux Administratif*, (1979-81) p. 566; Laubadere, "*Les Critère du Contrat Administratif sont-ils hiérarchisés ?*" (1981) A.J.D.A. 40.

⁷¹ See Amselek, "*La Qualification des Contrats de l'Administration par la Jurisprudence*" (1983) A.J.D.A. 3.

⁷² Conseil d'Etat, 20 Avril 1956; D. 1956, 433.

⁷³ For a detailed elaboration of the 'object of the contract' criterion, especially with regards to other cases (*Sté. La Maison des Isolantes C.E 26/6/1974*), see generally Auby, "*Les Critère du Contrat Administratif*" (1974) R.D.P. 1486-1498.

(3) Definitional Problems in Cameroon.

The distinctiveness of the administrative contract and the separate jurisdiction it carries with it has produced a crop of technicalities and subtlety of distinctions which have proven to be a trap for the courts and for the unwary litigant in Cameroon. The criteria for the determination of administrative contracts as outlined above may appear straightforward but Cameroonian courts have found the distinction between public and private contracts very elusive. More emphasis shall be given here to the common law jurisdiction because Anglophone practitioners and judges, more than their civil law confrères, have failed to grapple with the French law notion of the administrative contracts. This problem is not limited to administrative contracts, it extends to other areas of administrative law such as judicial review. In this regard, the problem is not peculiar to Common Law Cameroon. In a recent English case, *R. v. Dairy Produce Quota Tribunal for England and Wales, ex parte Carswell*,⁷⁴ on an application for judicial review, Lord Goff recounted how when the applicant consulted a local solicitor, he professed, with discomfiting sincerity, that he knew nothing about judicial review.

Reverting to administrative contracts in Cameroon, a review of the cases decided in the common law jurisdiction reveals a catalogue of ambivalent and inconsistent decisions. In *Chief Anufogo v. Kumba Urban Council*,⁷⁵ the plaintiff entered into a contract with the defendants (the local council) to build market stalls in the main market. In an action by the plaintiff for breach, the defendants raised a preliminary objection to the jurisdiction of the Kumba High Court on the grounds that the contract in question was administrative (they being a local authority) and that the proper place for bringing any such action was the administrative bench of the Supreme Court. The judge ruled against this objection, holding that the contract was governed by the

⁷⁴ [1990] 2 A.C. 738 at 744C.

⁷⁵ Suit no. HCK/1/82 (Kumba, unreported).

ordinary principles of contract law.

Yet, in another case, *Motase Ngoh David v Kumba Urban Council*,⁷⁶ decided by this same court and involving the same local council, a different conclusion was arrived at, even though the facts were very similar. This time the plaintiff had contracted to build an abattoir for the defendants. When he brought an action for breach in the high court, the defendants once again argued by way of a preliminary objection that the high court lacked jurisdiction on the grounds that the action was founded on an administrative contract. This time the court agreed and declined jurisdiction.

In a third case, *Tayong Vincent v State of Cameroon*,⁷⁷ the plaintiff supplied cement to the Rural Engineering Service (an arm of the Ministry of Agriculture) on credit terms and when payment was not forthcoming, he brought an action in the high court. The Ministry of Agriculture contested the jurisdiction of the high court, pointing out that the contract in question was administrative and therefore within the exclusive jurisdiction of the administrative bench of the Supreme Court. The judge ruled that the question of administrative contract did not arise here. "The transaction was an ordinary purchase of goods in the market by the state with no ingredients or character of an administrative contract in itself or contemplated", he declared. But he did not say what he considered these ingredients to be. Regrettably, it is not uncommon for many Anglophone judges to simply rule for or against the jurisdiction of the ordinary courts in these matters (the former is more often the result), without any discussion of the nature of administrative contracts.

For that reason, one must take a close interest in the recent Bamenda Court of Appeal decision in *Institute of Agronomic Research v. Union of Cameroon Indigenous Company*,⁷⁸ in which Inglis J., was prepared to tread where his

⁷⁶ Suit no. HCK/26/85 (Kumba, unreported).

⁷⁷ Suit no. HCB/101/86. (Bamenda, 22/6/1990, unreported).

⁷⁸ Suit no. BCA/13/90 (Bamenda, 25/11/1991, unreported).

colleagues have dreaded, by attempting to elucidate on the statutory and judicial criteria of administrative contracts. The appellants, a Research Institute attached to the Ministry of Scientific Research were defendants in the trial court. They entered into a written contract with the respondents whereby the latter was to construct for them two duplex staff houses at their research station. The respondents later discovered that the estimated cost of the project, prepared by the appellants experts was for only one of the houses and duly complained. The appellants re-estimated the cost and agreed to pay an additional sum. As the appellants were stalling over the payment of this extra sum after the full completion of the work, the respondents brought an action in the high court. Various issues were involved but the discussion here is limited to the issue of the nature of the contract and the incidental question of jurisdiction. The appellants, not surprisingly, argued that this was an administrative contract, thus objecting to the jurisdiction of the high court. The trial judge ruled against that objection on the basis that the appellants were a parastatal with a legal personality to sue and be sued and on this they appealed.

The Court of Appeal, relying on sections 9 (1) and 9 (2) of Ordinance No. 72/6 of 6-8-1972 (the Judicial Organisation Ordinance)⁷⁹ and Articles 1 and 133 of Decree No. 79/35 of 2-2-1979 (on public sector contracts), held that this was an administrative contract and therefore within the exclusive jurisdiction of the administrative bench of the Supreme Court. The ruling of the trial judge was thereby reversed. Inglis, J. in the Court of Appeal did not only rely on those statutory provisions. He amplified the ruling of that court by emphasising that the contract contained exorbitant clauses:

"Articles 19 and 20 of the contract are what is called in French Administrative law clauses exorbitantes du droit commun. These take

the contract out of the realm of private law."

Inglis, J.'s disposition of this case is admirable and noteworthy, not just because it is correct, but because it holds its place as as one of the rare instances in which a

⁷⁹ See below, p. 152.

common law judge has taken the pains to articulate on the elusive problem of the nature of administrative contracts. It is only by such gallant efforts that Cameroonian common lawyers will become accustomed to the problems posed by the special nature of administrative contracts.

The problems faced by Cameroonian common law practitioners in this area have often been attributed to their common law upbringing.⁸⁰ Although that link cannot be discounted, I have also noticed a deliberate reluctance on the part of Anglophone practitioners, for reasons (to be explained later) other than their legal culture, to concede that a contract is administrative, even when the fact that it is otherwise is very clear.⁸¹

Even though the special regime of administrative contracts is more familiar to Francophone lawyers, who are generally grounded in the French Civil law tradition from where it derives, the Francophone courts have not been immune to the jurisdictional niceties that have caused trouble and frustration to the common law practitioners. There are instances, for example, in which individuals have brought actions for breach of contract against local councils in the ordinary civil courts, on

⁸⁰ See Nguini, "*Droit Moderne et Droit Traditionnel*" (1973) 83 Pennant, 9; *Ibid*, "*La Cour Federal de Justice*" (1973) 83 Pennant, 348.

⁸¹ I made the following findings from interviewing 20 Anglophone practitioners on the subject: only one assured me he would readily take a matter straight to the administrative branch of the Supreme Court if he felt it clearly involved an administrative contract. And as if to prove that he meant what he said, he kindly offered me a copy of Law No. 75/17 of 8 December 1975 prescribing the Supreme Court Procedure in administrative cases. 6 of them were alarmingly unaware of the nature of the problem while the rest confessed that they would invariably start proceedings in the ordinary courts and would only go to the administrative bench of the Supreme Court as a last resort. Not surprisingly, therefore, only 2 of them had actually appeared before the administrative bench of the Supreme Court.

facts that point more readily to the administrative nature of the contract.⁸²

The case of *Societe Asquini Encorad v. Ebongue Hubert*,⁸³ vividly demonstrates that Francophone litigants and courts are also sometimes confused by the civil/administrative law dichotomy. The appellant, a construction company, was awarded a contract by the State and authorised to acquire and use all materials necessary for the execution of the contract. On the strength of that authorisation, the company extracted sand and gravel from land belonging to the respondent whereupon he sued in his local high court (Douala). The company contested the jurisdiction of the high court without success. The Douala appeal court upheld the high court ruling that it (the high court) was competent to deal with the matter because the subject matter of the action was over private rights over land belonging to a private person. The appellants carried on their appeal to the Supreme Court. The Supreme Court held that the dispute arose out of the execution of the contract between the appellants and the State and therefore fell within the exclusive jurisdiction of its administrative branch. In other words, the involvement of the State automatically brought the matter within the jurisdiction of administrative court. The decision of the high court, upheld by the court of appeal, was thus overruled.

In discussing some of the cases cited above, my aim has been to expose the judicial confusion in this area rather than to provide examples of "clear law". As a result of this maelstrom of conflicting decisions on the nature of the administrative contract, especially in Anglophone Cameroon, one must attempt to provide a usable criteria here.

It has already been said that administrative contracts can be determined either statutorily or judicially. In France, much of it is determined judicially through the use of the *clauses exorbitantes* and *service public* criteria. This is because *Droit*

⁸² For example, *Affaire Nde Benoit v. La Commune Urbaine de Yaounde*, J.C. No.270 du 27 Mars 1991, Yaounde (unreported); *Nkepche Pierre v. La Commun Urbaine de Yaounde*, J.C. No.209 du 6 Mars 1991, Yaounde (unreported).

⁸³ Arret no. 66/CC of 5/3/1981 (unreported).

Administratif in France, unlike all other areas of French law, is largely a creation of the judges.

As far as Cameroon is concerned, administrative law was largely introduced by means of legislation.⁸⁴ This means that administrative contracts have had to be determined in the main by statute. Pre-1979 statutory provisions no doubt allowed the courts some scope to apply judicial criteria to the question as to the appropriate regime to apply to contracts in which the administration was involved. Take for example, **Law No. 69/LF/1 of 14 June 1969** on the organisation and functioning of the Federal Court of Justice (this law actually transformed the administrative jurisdiction of this court into one of national competence by extending its jurisdiction to Common Law Cameroon).⁸⁵ Article 14 provided that administrative litigation consisted of, *inter alia*, disputes involving contracts (except those concluded, even implicitly, under private law)⁸⁶ or public service concessions. The courts, therefore, did use such criteria as *clauses exorbitantes* and *service public* to distinguish between public and private contracts. In *Robert Abunaw v Francis Wilson and Director of Lands and Survey*⁸⁷ and *Socopao v. Cameroon Development Corporation*⁸⁸ respectively, the Federal Court of Justice ruled against the jurisdiction of the administrative courts on the grounds that the disputes involved were of a private nature and therefore subject to the jurisdiction of the ordinary courts. The fact that the State and a State corporation were parties in both suits was not relevant. And in *Affaire Fouda Mballa v. Etat Fédéré du Cameroun*,⁸⁹ the court held that the construction of a sporting complex by the Electricity Corporation for its staff did not

⁸⁴ See generally Bipoum-Woum, *op. cit.*, note 57.

⁸⁵ Owona, *op. cit.*, note 62, 184-185.

⁸⁶ The emphasis are mine.

⁸⁷ C.F.J. Arret no. 3-A of 28/10/1971, cited in Nguini, *op. cit.*, note 60, 348.

⁸⁸ C.F.J. Arret no. 6-A of 10/3/1972, cited in Nguini, *op. cit.*, note 60, 349.

⁸⁹ Arret no. 160/CFJ/CAY du 8 Juin 1971, Rev.Cam.Dr. (1972) no.1, 40.

amount in any way to the provision of a public service.

The position, however, has since been affected by statute. First, by **Ordinance No.72-6 of 26 August 1972** (on the organisation of the Supreme Court) which provides in Article 9 (2): "Administrative matters shall include,....(e) any dispute expressly referred by law to the administrative courts" and more recently by **Decree No. 79/35 of 2/2/1979** (relating to public sector contracts). Article 1 defines a public sector contract solely in terms of the presence of the state, a local authority or a public establishment while Article 133 provides for the jurisdiction of the administrative bench of the Supreme Court in all cases in litigation concerning contracts subject to this decree. The combined effect of all these provisions has been to exclude the use of judicial criteria or to relegate them to a subsidiary role. The mere presence or involvement of the administration will suffice to classify the contract as administrative.

This is best highlighted in *Compagnie Forestiere Sangha - Oubagnui v. Etat du Cameroun*.⁹⁰ A French coffee plantation owner died in Cameroon, intestate and with no apparent heir. The Cameroon government (the ministry of agriculture) took over ownership and decided to lease out the plantation to the plaintiff company. It was agreed that in order to represent the public's interest in the running and management of the plantation, the government would appoint a civil servant on secondment to work with the plaintiff company. The State was to continue paying the salary of the civil servant while the plaintiffs were to provide him with adequate means of transport. But when the civil servant was eventually appointed, the Minister for Public Service ordered the plaintiffs to pay his salary. They protested that such a requirement was a flagrant violation of the terms of their contract with the State. Aggrieved, they brought an action against the State in the administrative bench of the Supreme Court where it was held that the salary of the civil servant on attachment

⁹⁰ Jugement No.07/88/89 du 27 Octobre 1988, (1991) 2 & 3 Rev.Jur.Afr. 131, (note Nlep).

with the plaintiffs must remain the responsibility of the State in accordance with the terms of the agreement between the parties.

The decision is beyond reproach but the case is of interest here because the view has been expressed that the running of the plantation by the plaintiffs with the aim of making profits does not in any way amount to the execution or the provision of a public service.⁹¹ This by implication calls to question the administrative character of the contract. If the view that the running of the plantation did not constitute a public service is correct, then, the classification of this contract as administrative is highly questionable. However, one must not be oblivious of the 1979 Decree. On the interpretation of that decree, this contract qualifies as administrative. The decree, it must be stressed, makes no mention of the object of the contract and therefore does not require that the contract should aim at the execution of a public service for it to be classed as administrative. The crucial factor for consideration is whether the state or a public authority is a party to the contract and the classification of this contract as administrative seems to have been based solely on the fact that the State was a party to it.

The Supreme Court has even extended the 1979 Decree to disputes arising out of the contract involving third parties who are not privy to it. For example, in the *Asquini Encorad* case,⁹² the contract was between the government and Asquini Encorad, yet when the plaintiff brought an action for trespass to his land, the Supreme court, overruling the Appeal Court, held that as the dispute resulted from the execution of an administrative contract, only the administrative jurisdiction of the Supreme Court could be properly seised.

It should be clear from the legislative provisions and the Supreme Court decisions considered above, that the main criterion for the determination of administrative contracts in Cameroon today, is the mere involvement (direct or indirect) of the administration or public body as a party to the contract. The emphasis has now been

⁹¹ Nlep., *op. cit.*, note 90, 136.

⁹² *Supra*, note 83.

shifted firmly towards statutory determination, precisely on the 1979 Decree on public sector contracts.

The main problem with the 1979 Decree, however, is that its purview is too wide. It automatically subjects to public law, certain contracts whose content is private in character - for example, contracts of a purely commercial nature like the one about the plantation lease above.

It is not clear what the legislator intended the 1979 Decree to achieve. It is not unlikely that it was a surreptitious, if ingenious attempt by the administration to indirectly subject to its own control, via the administrative bench of the Supreme Court,⁹³ contractual dealings of any kind in which it becomes involved. If this be the case, then it should, perhaps, be pointed out that the 1979 Decree, by increasing the scope for public law contracts, has merely added to the many logistical problems that already bedevil this area of the law.

It is also possible that the 1979 Decree was a genuine attempt by the legislator to put an end to the difficulties in the distinction between civil and administrative contracts, simply by labelling all contracts involving the administration as administrative. Such a sweeping approach, granted that was the intention, is still to be achieved. Some of the cases cited above clearly reveal how some judges, especially those in the common law jurisdictions, are registering their protest against such a blatant publicisation of all contracts involving the administration. They do so by ignoring the 1979 Decree and by refusing to consider contracts as administrative solely on the basis of the participation of the administration or public authority. Of course, doubt must occur whether it is proper for a judge to sidestep or ignore

⁹³ Whatever one may say about judicial independence in Cameroon, the fact remains that judges are civil servants appointed by the government. It follows from this that they may not fancy awarding too many judgements against the government lest they stifle their own career prospects. To make this observation is not necessarily to impugn the professional integrity or impartiality of the judges. But few judicial observers in Cameroon can deny the suggestion that where the interests of the government is directly involved, a kind of subtle pressure is mounted on the judge concerned.

statutory provisions that have been duly enacted by the law making body of the country, the National Assembly (Parliament). Yet this only serves to emphasize the troublesome nature of the problem.

It would be dotty to think that all the problems relating to administrative contracts derive from the difficulties in distinguishing them from private contract. Many other problems of an even more practical nature are raised by the poor judicial organisation. I now turn to them.

(4). Jurisdictional Concerns.

In France, the control of administrative authority (and administrative contracts) are vested in the administrative courts, i.e the *Tribunaux Administratif*, the *Cours d'Appel administratif* and the *Conseil d'Etat*. The same is true of Cameroon except for the fact there is only one administrative tribunal and that is the administrative bench of the Supreme Court. In practical terms, therefore, it cannot be said that Cameroon has a separate order of administrative courts. Nevertheless, the administrative bench of the Supreme Court performs the same functions as the administrative courts in France. Article 133 of the 1979 Decree provides that the administrative bench of the Supreme Court shall have jurisdiction in all cases in litigation concerning public sector contracts. This clearly guarantees too much jurisdictional protection to the state in the form of an overcentralised system of administrative justice which in turn has created some serious practical problems.

The first concern that one must have in mind is the high cost of going to the Supreme Court, especially if the plaintiff does not reside in Yaounde, the seat of the Supreme Court. This cost is not limited to legal costs but includes other expenses as travel and accomodation. When one considers the wherewithal of many Cameroonians and the geography of the country, one easily appreciates the size of this problem.

Suppose X, a small businessman in Kousseri intends to bring an action against his

local council for the unpaid balance of stationery he supplied them. His claim is only for five hundred thousand francs. On the interpretation of the 1979 Decree, this will fall under the regime of administrative contracts, with the consequence that he can only bring his action before the administrative branch of the Supreme Court in Yaounde. Kousseri is over thousand kilometres from Yaounde. Unless he can afford to travel by air, it may take him at least a couple of days to get to Yaounde, and because the case will most certainly suffer some adjournments, they will have to make more than a few trips before the matter is finally adjudicated. As his expenses plus legal fees are more likely to be in excess of his claim, he may be forced to abandon it or not start any action at all, leaving him with no other remedy and no other access to justice. This is precisely the kind of predicament in which many who may be contemplating bringing an action against the administration are likely to find themselves. It serves as a very good example of denial of justice.

Then there is the problem of complex procedure.⁹⁴ The procedure of the administrative litigation in Cameroon is governed in practically all aspects by three main texts: **Ordinance no. 72-6 of 28/8/1972** (on the organisation of the Supreme Court), as modified by **Law no. 76-28 of 14/12/76**; **Law no. 75-16 of 8/12/1975** (on the procedure and functioning of the Supreme Court) and most importantly, **Law no. 75-17 of 8/12/1975** (on the procedure of the administrative bench of the Supreme Court). This procedure is extremely onerous, especially for the private party and it would be no exaggeration to suggest that the above law only serves to secure to public bodies certain procedural protections.

Closely related to the issue of procedure is the language difficulty for Anglophone lawyers and litigants. Not only will they have to deal with unfamiliar substantive and procedural rules, they will also have to put up with a great deal of the French language, which they may hardly understand. Although some of the texts have been

⁹⁴ Happily enough, there is now a practical guide on this problem. See Kamto, **Droit Administratif Processuel du Cameroun - Guide Pratique**, Yaounde, 1990.

translated into English, to suggest that the language problem can simply be overcome by translation, is to facilely dismiss it.

The administrative bench also suffers from that ubiquitous malady of the modern state: judicial overload. It must be remembered that the administrative bench is not only concerned with administrative contracts but also with the legality of administrative action of any kind. It is consequently overburdened with cases which it cannot conveniently deal with within a reasonable time.

Another matter of jurisdictional concern is the conflict between civil and administrative jurisdiction. Bearing in mind that only the administrative bench of the Supreme Court has administrative jurisdiction throughout the entire country, one would expect that there should be no conflict. But because the distinction between civil and administrative contracts is elusive, not only to litigants as some observers would have us believe,⁹⁵ but to the courts as well, it is not always very clear whether the ordinary or the administrative jurisdiction should be seised.

In France, the *Tribunal des Conflits* resolves conflicts between the civil and administrative courts. In Cameroon, the *Tribunal des Conflits* is conspicuous by its absence. Which is not to suggest that Cameroon has no solution to the problem.⁹⁶ This is to be found in Articles 13 and 15 of the **Ordinance no. 72-6 of 26/8/1972**. They provide that all courts with non-criminal jurisdiction, the administrative bench of the Supreme Court included, must decide by way of a preliminary ruling on the objections by one party to its competence. In the case of the administrative bench, if either of the parties is not satisfied with the ruling, they have a right of appeal (within eight days) to the full bench of the Supreme Court, whose ruling is final.

⁹⁵ Some commentators appear to attribute the difficulty of the public private law distinction solely to the parties, for e.g. Binyoum, *op. cit.*, note 59, 2eme. Partie, 1961-72; and Mescheriakoff, "Le Regime Juridique de Recours Gracieux Prealable dans la Jurisprudence Administrative Camerounaise" (1978) 15 & 16 Rev.Cam.Dr. 54.

⁹⁶ For a discussion on the question of conflict in Cameroon, see Owona, *op. cit.*, note 62 p.202.

This looks sound on paper but it does not pass well the test of reality.

First, it must be pointed out that although the courts are required to make only a preliminary ruling on their competence, that alone usually takes quite a long while especially if appeals are involved.⁹⁷ Secondly, these provisions seem to presuppose that the parties to any alleged administrative contract will take their disputes at first instance to the administrative bench of the Supreme Court. But that is rarely the case in practice. In fact, of the cases cited above, only in one, *Cie Forestiere Sangha-Oubangui v. Etat du Cameroun*,⁹⁸ did the plaintiff directly start proceedings in administrative bench of the Supreme Court.

The actual trend as disclosed by the cases is as follows: The plaintiff (always the private party) starts his action in the local high court. The public party or the administration objects to the jurisdiction of the high court on the grounds that the action is founded on an administrative contract. If the high court rules that it is not competent, the private party is likely to appeal. If it decides that it has jurisdiction, the public party or the administration invariably appeals. And these appeals may be taken all the way to the Supreme Court. Thus far, every bit of litigation, plus the costs and time involved, has only been to determine the proper jurisdiction to try the case. Nothing substantive as yet. At this point, spare a thought for my hypothetical plaintiff from Kousseri. It is surely ridiculous that he should have to go through the high court, the court of appeal and possibly the Supreme Court, hundreds of kilometres away, only to determine the competent court or jurisdiction to try his case. And worse still, the Supreme Court may rule in the end that the contract over which the dispute arose after all, was a civil one and therefore within the competence of the high court. It will be recalled that this actually happened in the cases of *Robert*

⁹⁷ For e.g. it took three years to dispose of the dispute over the nature of the contract in the case of the *Institute of Agronomic Research v. Union of Cameroon Indigenous Company* from when it was first instituted in the Bamenda High Court in 1988 (suit no. HCB/55/88) to when the Court of Appeal finally ruled on the appeal on 25/11/1991 (Appeal no. BCA/13/1990).

⁹⁸ *Supra*, note 90.

*Abunaw v. Francis Wilson and the Director of Lands & Survey*⁹⁹ and *Socopao v. Cameroon Development Corporation*.¹⁰⁰ Such a system which can be described as one in which the parties have to litigate in order to litigate is characterised by undue delay and too much expense for the litigants, especially the private party.

As a result of the high costs and delay involved and the excessive jurisdictional and procedural supremacy that the state enjoys, there is not much confidence in the system of administrative justice in Cameroon. It is partly for these reasons (the other being the common law upbringing of the lawyers, in the case of Anglophones or the fact that they are not specially trained in administrative law, in the case of Francophones) that some lawyers, especially the Anglophone ones, improperly and flagrantly seek to avoid the administrative bench of the Supreme Court by taking suits arising from contracts that are clearly administrative in character to the ordinary courts. They are encouraged by the fact that such attempts are not always without success since there is always chance that an ordinary civil court may consider the case on the grounds that it is an ordinary civil or private contract. The problem with this ploy is that if the administration or public authority appeals, as they often do, it is the private litigant who suffers the most from the delay and costs involved in moving from the ordinary to the administrative jurisdiction.¹⁰¹ Sometimes the State or public body appeals against the jurisdiction or judgement of an ordinary civil court not so much on merit but simply to obtain the benefit of the delay involved in obtaining a hearing from the administrative branch of the Supreme Court.

⁹⁹ *Supra*, note 87.

¹⁰⁰ *Supra*, note 88.

¹⁰¹ For example, while the private party may be expected to pay a court deposit during litigation, art. 3 (3) of Law no. 75-17 of 8/12/75 exempts public parties from the payment of such deposits. Obviously, a private party or individual will find it difficult to forgo the use of such amounts of money during litigation, especially if it is lengthy.

(5). Conclusion.

It is clear from the analysis so far that the special regime of administrative contracts in Cameroon is a poor imitation of that of France, from where it derives. Yet as already pointed out, it would be wrong to assume that the problems that beset Cameroon are all due to the distinctiveness of administrative contracts and the special jurisdiction they carry with them. After all, the system works fairly well in France and is full of admirers in the common law world. The problems in Cameroon are caused more by the poor mechanics or the malfunctioning of the system than by the sheer distinctive nature of *contrats administratifs*. And these problems are not insuperable by any means.

The obvious step in the direction of obviating these problems is to decentralise the administrative jurisdiction of the Supreme Court by creating administrative courts of inferior jurisdiction in the provinces. This is what the French have done in response to the problem judicial overload. By the Decree of 30 September, 1953, the old *Conseils de Prefecture*,¹⁰² which previously had only limited administrative jurisdiction were transformed into *Tribunaux administratifs* and given general jurisdiction as administrative courts of first instance. The *Conseil d'Etat* thus became for most purposes a court of appeal. This two tier structure, however, suffered from a major defect in that it denied the dissatisfied litigant the fundamental right to challenge a decision on cassation.¹⁰³ But even more urgent was the recurrent problem of too many cases - the very disease that it was meant to cure. More reform

¹⁰² For its history and functions, see Remington, *op. cit.*, note 38, 46.

¹⁰³ This must not be confused with the right of appeal which was readily available to the dissatisfied litigant. The right to challenge a decision on cassation is not, in principle, a right of appeal - it exists even where appeal is specifically excluded - and it rests on the idea that a decision which is based on an error of law, substantive or procedural, cannot be allowed to stand. If a decision is quashed on cassation, the case will normally be remitted elsewhere for a fresh decision.

was again needed and the French legislature obliged by passing the **Law of December 31, 1987** which came into force on January 1, 1989.¹⁰⁴ Article 1 of that law created five *cours administratifs d'appel* (administrative courts of appeal) with jurisdiction to hear appeals¹⁰⁵ from the *tribunaux administratifs* and from whose decisions recourse in the form of cassation is available to the *Conseil d'Etat*.

It is not suggested that these reforms have solved all the problems of administrative justice in France but it is submitted that if they are carefully transposed into Cameroon, many practical problems would be erased. Firstly, the creation of administrative courts at provincial level will not only cut down costs for the litigants as they will not necessarily have to go to the Supreme Court in Yaounde but will also be seen as a genuine attempt by the administration to reduce the excessive jurisdictional advantage that it unduly enjoys presently. Secondly, it will give Anglophone lawyers and litigants the opportunity to conduct cases in English thereby solving the language problem.

Against the proposition for decentralisation may be raised that perennial argument of want of resources and personnel, precisely that they may not be enough administrative judges. But this argument can be easily countered. The "administrative judge" in Cameroon, unlike in France, is not specially trained in administrative law. Judges of the civil or ordinary courts are assigned to the administrative bench of the Supreme Court. If this can be done in the Supreme Court, there is no reason why it cannot be done in the high courts too. The

¹⁰⁴ For more on this law and the reforms it brought about, see: Jolowitz, "Administrative Justice in France - A New Step in the Hierarchy" (1988) 47 C.L.J. 367, and Brown & Bell, "Recent Reforms of French Administrative Justice" (1989) 8 C.J.Q. 71. Much has been written about this reform in France. Pages 74-134 of the February 1988 edition of the A.J.D.A. are devoted to various analyses of these reforms, but see particularly Franc, "Commentaires sur une reforme", p.79.

¹⁰⁵ Certain matters e.g. appeals challenging as *ultra vires*, decisions of a legislative character and local election cases are excluded from the jurisdiction of the administrative courts of appeal but contract is included.

suggestion here is for special administrative sections to be attached to the high courts and be given some limited jurisdiction over administrative contracts. This could be linked to the amount of the claim so that disputes arising from contracts with the administration involving small claims can be settled locally. The courts of appeal too should have such administrative sections to hear appeals from the high courts on such matters. In order to maintain the special character of administrative contracts, the administrative sections of the high courts and the appeal courts, shall have to apply only substantive and procedural rules of public law when adjudicating on disputes arising from administrative contracts.

Decentralisation, though, will not necessarily put an end to the problems caused by jurisdictional uncertainties. To solve such problems, a French style *Tribunal des Conflits* is certainly not needed. What is needed is something much more simple and much less formal. It has already been proposed that limited administrative jurisdiction should be extended to high courts. On the problem of jurisdictional uncertainty, it is hereby proposed that the courts at all levels should have a panel of judges drawn from those who sit mainly on the administrative bench and those who sit mainly on the ordinary or civil bench, whose task would be to act as a *tribunal des conflits* in cases of conflict or in cases in which the parties or their counsel are not exactly sure of the proper jurisdiction. This panel should determine such conflicts in chambers, but the dissatisfied party must retain the right to appeal against its ruling. A scheme like the proposed one has two main advantages. By drawing on judges who sit on both the administrative and civil sections to decide on the question of the proper jurisdiction, the possibility of suing in the wrong one is greatly reduced, thereby saving the parties involved from the nightmare of having to exhaust the entire court hierarchy in a bid to determine where to sue. Secondly, it is much faster and less costly than the present system because everything can be sorted out in chambers.

The view has been put forward that one major reason for the problems of administrative law in Cameroon is the absence of the *juge administratif* i.e. the

pecially trained administrative judge.¹⁰⁶ It is, in fact, ironic to have a distinct regime of public law that is manned almost entirely by judges trained in private law. This can no doubt be explained by the fact that there were hardly any trained administrative judges of Cameroonian nationality in the immediate aftermath of independence. In that regard, their absence was understandable. What is less comprehensible however is the fact that thirty years on there have been no attempts to train administrative law judges, even though there is a centre for the training of private law judges.¹⁰⁷ The introduction of the specially trained administrative judge will definitely help, but that will not dispense with the need to decentralise administrative litigation.

These proposals may not be a panacea to all the problems relating to the special regime of administrative contracts but if implemented, they should help to achieve what is considered, at least on paper, to be the advantages of a separate administrative jurisdiction, namely: speedier settlement of disputes, a flexible and informal procedure and the protection of the respective interests of the private individual and the all powerful public authority. Proposals such these would have to be put in place if Cameroonians are to regain confidence in a system which they regard quite correctly to be too close or too much in favour of the administration.

However, while many reorganisation of judicial institutions are often suggested and much debated in Cameroon as well as in other countries, in the case of Cameroon, the sad reality appears to be that changes are only implemented when

¹⁰⁶ Kamto, *op. cit.*, note 62, p. 11; Bipoum-Woum, *op. cit.*, note 57; Nlep, *op. cit.*, note 90, 133.

¹⁰⁷ The *Ecole Nationale de l'Administration et de la Magistrature* (E.N.A.M.) Yaounde, is an elite school for the training of senior civil servants and judges fashioned on the French "*Grande Ecole*". But it trains judges primarily in the field of private law. In France, there are separate centres for the training of administrative and civil judges respectively. Two centres are not needed in Cameroon, not least because of the likely cost to be involved in that. It will be sufficient if a section of E.N.A.M. is devoted to the training of administrative judges or better still, for the specialisation of those civil judges who may want to work as administrative judges.

deemed politically necessary or advantageous. It is therefore unlikely that the present government would be bothered about changing a system that is overwhelmingly in its favour. Ironically, there are three public law professors in the present cabinet,¹⁰⁸ some of whom in their pre-government days, were complaining about the inadequacies of the system of administrative justice in Cameroon, especially in its treatment of the private party or individual. It is certainly not lost on Cameroonians that they are now eerily reticent on the issue.

¹⁰⁸ Professors Joseph Owona - until recently, government secretary, now the Health Minister and author of **Droit Administratif Spécial de la République du Cameroun**; Kountchou Koumegni - Minister of State for Information; and J.M. Bipoum-Woum - Minister of Culture.

CHAPTER FIVE

OFFER AND ACCEPTANCE.

In the previous chapters, various general aspects relating to contract law were considered. Following that, it is now proposed to concentrate on some of the substantive rules or principles of contract law in Cameroon, starting with the rules that govern the formation of contracts. As might be expected, they are very much the same as those in England and France.

In Common Law Cameroon, the courts always recite the traditional common law requirements of offer and acceptance, consideration and intention to create legal relations as being necessary for the formation of any contract.

In Civil Law Cameroon, Article 1108 of the Civil Code lays down the four conditions that are essential to the validity of an agreement as follows:

- the consent of the parties;
- their capacity to contract;
- a definite object and finally,
- a licit cause to the obligation.

It will be observed that the basic requirements for the formation of contracts under both systems are broadly the same even though they are certain material differences as to how these systems conceptualize these rules. For example, both systems are agreed on the rule that for there to be a contract, there must be a firm offer, followed by an unqualified acceptance. But in Common Law Cameroon, there is a further requirement of consideration, while the corresponding rule in Civil Law Cameroon is that there must be a licit cause to the contract.

Two main topics will be discussed under the formation of contracts: offer and acceptance and consideration and cause. This chapter is devoted to the former while the next chapter covers the latter. The requirement of intention and certainty will not

be treated.¹ This is not to undermine its role in the formation of contracts,² even though one must admit that in the case of the common law for example, the application of the objective test to the role of intention, limits the extent to which the parties' intention govern the ascription to them of contractual duties.³ As for French law, there is not, in truth, any express principle that there must be an intention to create legal relations. However, it would be fair to say that in French law any serious agreement which is not contrary to *ordre public* is a contract.

Although in *Zebulon Koshi Munshwa & Martin Ngwa Banduh v. Ngwaniba Stephen Njofo*,⁴ the Bamenda Court of Appeal reaffirmed the rule that "the parties must mean business i.e. they must intend to enter into legal relationship", for there to be a valid contract, the fact of the matter is that the question of intention is rarely the issue before the courts in Cameroon and as a result, does not seem to raise problems of any practical nature.⁵ In Cameroon as in elsewhere, contracting parties rarely consider this question at all. It has even been said that it is the law itself which has created a presumption that business agreements are binding contracts, while other agreements of a social and domestic nature are not.⁶ This is true of both

¹ For an examination of the purpose and effect of the alleged rule of English law that an agreement supported by consideration will not be enforceable as a contract unless there is additional proof of an intention to create legal relations, see Hepple, *Intention to Create Legal Relations* [1970] C.L.J. 122 et s.

² With regards to the common law, Professor Williston (Williston, *Contracts*, section 21) has argued strenuously that the common law does not require any positive intention to create a legal relation as an element of contract. Whatever the merits and demerits of that view, the conventional English view is that, in addition to the phenomena of agreement and the presence of consideration, a third contractual element is required- the intention of the parties to create legal relations. It is submitted that the Cameroonian courts are most unlikely to be persuaded by Williston's arguments.

³ De Moor, "Intention in the law of Contract: Elusive or Illusive" (1990) 106 L.Q.R. 632.

⁴ BCA/1/79 (Bamenda, 10-04-1979, unreported).

⁵ The Cameroonian courts are hardly ever confronted with cases in which there is a contention of lack of intention. In other words the gist of the problem in many cases rarely ever centres on the question of intention. The parties do not often deny the fact that they intended to enter into a contract.

⁶ Tillotson, *Contract Law in Perspective*. 1985, p. 9.

systems of law under consideration.⁷ Suffice it to say here that Cameroonian courts will not, and in fact do not, enforce any contract where they find the intention to engage into legal obligations is lacking.⁸

1. THE REQUIREMENT OF OFFER AND ACCEPTANCE.

Even though English and French law abounds with so much literature on offer and acceptance, on revocation, lapse of offer, the place and time of acceptance, on whether silence counts as acceptance etc.,⁹ they still remain the convenient and logical starting point for any study on the formation of contracts, not least because it provides the most common framework for the analysis of contract formation.

An exhaustive survey of all aspects of offer and acceptance is not necessary. I shall focus on the basic concept and structure of the doctrine. My concern will be to analyze how the doctrine of offer and acceptance has been interpreted and applied by Cameroonian courts, and to consider some problems raised by the doctrine. It may also be of some interest to highlight some similarities and differences in approach between the common law and the civil law in Cameroon.

As is the case in England and France,¹⁰ in both the Common Law and Civil Law Cameroon, judicial inquiry into the very existence of a contract seeks to find

⁷ For English law, see generally Treitel, *The Law of Contract*, 1991, pp 149-160; Cheshire, Fifoot and Furmston, 1991, pp. 111-121; and for French law, see the brilliant articles by Oppetit, "L'Engagement d'honneur", D. 1979, chr. 107; Mayer, "L'Amitie", (1974) JCP. I. 2663; and Camille Jauffret-Spinesi, "The Domaine of Contract Law: French Report", In: Harris and Tallon, eds., *Contract Law Today: Anglo-French Comparisons*, 1989, p. 122.

⁸ See *Nche Mela v. Vincent Chi Nso Ngang* HCB/56/86 (Bamenda, unreported).

⁹ See the comprehensive surveys of Aubert, *Notions et Roles de l'Offre et de l'Acceptation dans la Formation du Contrat*, 1970; and Schlessinger, ed., *Formation of Contracts: A Study of the Common Core of Legal Systems*, 1968; Parviz Owsia, "The Notion and Function of Offer and Acceptance Under French and English law" (1992) 66 Tul.L.R. 871; Corbin, "Offer and Acceptance" (1917) 26 Yale L.J. 169; Litvinoff, "Offer and Acceptance in Louisiana Law: A Comparative Analysis" (1967) 28 La. L.R. 1.

¹⁰ See generally the English and French Reports in Rodière, ed., *Harmonisation du Droit des Affaires dans les Pays du Marché Commun - La Formation du Contrat*. 1976

something called an 'offer' and something called 'an acceptance'. Thus the basic rule is that a contract is concluded when a firm offer is made and this offer is unconditionally accepted. This rule is so entrenched in both systems that its operation seems to be taken for granted as a natural and logical mechanism by the courts in Cameroon.

The importance of offer and acceptance in contract formation is very much underlined by the fact that Cameroonian courts have been known to grant or deny damages by finding the existence or absence of a valid offer and acceptance. In *Bassum Thadeus v. Youya Francis*,¹¹ the Bamenda Court of Appeal, re-emphasised the rule that in order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and acceptance to that offer by the other. In that case the respondent offered to pay the appellant a block sum of money if the latter would serve in his business. It was agreed that the appellant would earn no salary while serving the respondent but that the said block sum was to be paid to him when he became "mature" enough to start his own business. The appellant did serve the respondent for about eight years and because the latter would not keep to his promise, the appellant sued him for breach of contract. The trial judge held that there was no contract because the respondent's promise was gratuitous. This was a surprising decision in view of the fact that this practice is commonplace in Cameroon.

Reversing that decision, the Court of Appeal observed that that the trial judge had misconstrued the relationship of the parties by failing to address his mind to the principles of offer and acceptance. It took the view that from the conduct of the parties, it was clear that the requirements of offer and acceptance were satisfied, culminating to a contract. The appellant was therefore entitled to succeed.

In Civil Law Cameroon, article 1101 of the Civil Code lists the consent of the parties as one of the requirements of a valid contract. But the term consent, in contractual matters, bears two different connotations. In one sense it means the

¹¹ BCA/48/84 (Bamenda, 12-07-1985, unreported).

accord of two parties' wills on the projected contract, or the meeting of their minds. In the other and more restricted sense, consent means each party's individual acquiescence to the conditions of the projected contract, given with the intent of creating a legal obligation.¹² It is submitted that actually the two references of the term consent do not differ in essence. Since no contract will result unless some unity can be reasonably predicated on what both parties had in mind, no particular importance will be attached to the distinction between the two meanings of the term consent.

The concept of consent in French law is best analyzed in terms of offer and acceptance.¹³ Put another way, offer and acceptance is an expression of consent.¹⁴ It is thus not surprising to note that in Civil Law Cameroon, an analysis in terms of offer and acceptance was proffered in **Ste Balton -Cameroun v. Pierre Bougha**.¹⁵ In that case the respondent sued the appellants for breach of contract, alleging that the latter had failed to meet up with a contractual undertaking to supply his private medical practice with some equipment. To support his claim, the respondent produced a letter in which the appellants had irrevocably undertaken to perform the alleged contract:

"Par cette lettre nous vous confirmons que notre société s'engage fermement et de façon irrévocable de délivrer tout l'équipement médical et toutes les installations etc... pour votre nouvelle clinique comme convenu avec vous et que nous arrangerons la totalité du financement nécessaire".

For their part, the appellants protested that this letter amounted to neither an offer nor an acceptance, with the consequence that there was no contract. But the Supreme Court, like the Yaounde Court of Appeal before it, was satisfied that the letter

¹² Planiol et Ripert (2nd. ed. Esmein) vol. VI (1952) para. 99.

¹³ Ghestin, **Les Obligations - Le Contrat: Formation**, 1988, para. 199; Aubert, *Op. cit.*, note 9, para. 1.

¹⁴ Weill & Terré, **Les Obligations**, 1986, paras. 132-3.

¹⁵ Pouvoir No. 59/CC/84-85 du 08/9/1983. (Unreported).

amounted to an acceptance since it was clear from its content, especially the words "*comme convenu avec vous*", that the appellant had earlier made an offer. It was held accordingly that the respondent's action for breach must succeed.

It is clear from the above cases that the analysis of contract in terms of offer and acceptance is common to both the common and the civil law. Yet this homogeneity of terms must not mislead one into minimizing the difference in practical results which can flow from the inquiry into offer and acceptance under both systems.¹⁶ This difference is often clothed in terms of a dichotomy between objectivity and subjectivity, namely: that the common law applies an objective test¹⁷ in its interpretation and understanding of *consensus* whereas French law adopts a subjective approach.

Explained more fully, this means that the common law approach to offer and acceptance is empirical and generally linked to objective inferences to be drawn from the acts of the parties while the civil law treatment, by contrast, is made analytically with reference to the will (*volonté*) or the consent (*consentement*) of the parties.

The objective nature of English contract doctrine has received express judicial recognition in Common Law Cameroon. This is evident in the decision in **Bassum v. Youya**,¹⁸ in which the Bamenda Court of Appeal confirmed that,

"In answering the question as to whether there has been offer and acceptance, the courts apply an objective test. If the courts have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree."

While the courts in Common Law Cameroon generally follow and apply the detailed rules of offer and acceptance that have evolved in England and other common law jurisdictions, there are no such detailed rules in Civil Law Cameroon. This is

¹⁶ Nicholas, *French Law of Contract*, 1982, p. 59 et. s.

¹⁷ For more on the objective nature of English contract doctrine, see e.g. Howarth, "*The Meaning of Objectivity of Contract*" (1984) 100 L.Q.R. 265, and "*A Note on the Objectivity of Contract*" (1987) 103 L.Q.R. 527; Vorster, "*A Comment on the Meaning of Objectivity of Contract*" (1987) 103 L.Q.R. 275.

¹⁸ *Supra*, note 11.

because the Cameroonian (and French) Civil Codes do not contain any rules on offer and acceptance and as a result, significantly lack any coherent approach to the question. This brings one to another major difference between the two systems. French law generally embraces a wider area of fact as opposed to law than English law. Questions of fact are exclusively within the *pouvoir souverain* of the trial judge, with the Supreme Court or other appellate courts being able to exercise any control only in limited circumstances.¹⁹ Matters of offer and acceptance are considered to be a question of fact because the question as to whether or not there is an agreement is itself a question of fact. For that reason neither the Code nor any other text lays down any rules on offer and acceptance. The only requirement is that there should be agreement.

That said, there are three areas under the French Civil Code that have recently been interpreted as providing a predetermined pattern of offer and acceptance. These include article 1108 on the requirement that there should be consent of the party who obligates himself,²⁰ and articles 894 on donation and 1984 on mandate²¹ respectively. Since these articles are also contained in the Cameroonian Code, there is no reason why this kind of interpretation cannot be extended to Cameroon.

Although the relevant texts of both Civil Codes may be open to the kind of interpretation just canvassed above, it is nevertheless my contention that there is no need to stretch them to suit the offer and acceptance analysis. It seems clear to me that the Code is concerned throughout with the consensualist principle of mutual assent and not with the mechanism of its formation, which may explain why under

¹⁹ See the discussion on the Supreme Court in chapter 1.

²⁰ See 1 Marty & Raynaud, *Droit Civil- Les Obligations*, 1988, para. 107, where it is said that article 1108 appears to require that the offer be made by the party "who obligates himself" and the acceptance be made by the other party. But they were careful to add that this is not necessarily the case.

²¹ Some authors such as Ghestin, para. 207-1 (citing Rouhette, *Droit de la Consommation et Théorie Générale du Contrat*, In: *Etudes RODIERE*, no.14, 1981, p. 259), maintain that, for the conclusion of nominate contracts of donation and mandate, "the acceptance necessarily emanates from the donee (art.894) and the agent (art.1984) and therefore it is irreversibly the donor and the principal who make the offer, no matter where the initiative came from and what twistings the possible bargaining might have undergone."

the general part of the Code regarding a contract no reference is made to offer and acceptance.

Under both systems in Cameroon, offer and acceptance may be made in any form whatsoever, except for particular contracts where a statute requires that special formalities should be complied with. These formalities usually consist in the necessity of a written document which is registered and notarised.²² But generally, the offer as well as the acceptance may be express, implied or tacit.

2. OFFER AND INVITATION TO TREAT.

English law makes a distinction between an offer and an invitation to treat. The negotiations that lead to many contracts often involve some preliminary communications between parties. Not every request or statement, for example, by one party is to be considered an offer. For there to be an offer the maker of such request or statement must back it with an intention to be bound on acceptance otherwise it will amount to nothing more than an invitation to treat.

French law also recognises this distinction. Since an offer is an indispensable element of that concurrence of the wills of which the contract consists, it is always important to determine whether a certain declaration of will amounts to a real offer or is merely a declaration made without an intention of becoming bound such as a simple proposition (*pourparlers*).²³

Whether a particular statement is an offer or an invitation to treat is always a question of fact and depends on the elusive criterion of intention.²⁴ The distinction therefore is not always evident even though English law has evolved certain rules which *prima facie* determine the distinction in some stereotyped situations (such as

²² For formalities in contract, see chapter 7 below.

²³ Weill & Terré, para. 134; Ghestin, paras. 203 and 206.

²⁴ See generally, De Moor, *Op. cit.*, note 3.

display of goods for sale, auction sales, advertisement, etc.).²⁵

While both systems make a distinction between an offer and an invitation to treat, they sometimes differ in the way they make that distinction.²⁶ French courts are far less reluctant than English courts to hold that a proposal to the public at large constitutes an offer. The *Cour de Cassation* has in fact made sweeping statements to the effect that "offers to the public at large" are not to be treated differently from "private offers".²⁷ As long as the proposal, in being complete and firm²⁸ reflects the maker's willingness to enter into a contract on a specific set of terms, French courts are prepared to classify it as a contract. It follows that while English law construes advertisements and price lists as mere invitation to treat,²⁹ in French law, there is a tendency in these cases to construe the proposal as an offer.³⁰ Again, English law regards the display of goods in a shop window as an invitation to treat³¹ even if the price is indicated while French law considers that as an offer.³²

The courts in Common Law frequently make use of the distinction between an offer and invitation to treat, as the decision in the much litigated case of **John**

²⁵ Treitel, p. 10 ff.

²⁶ See generally, Schlessinger, *Op. cit.*, note 9, vol. 1, pp. 344-354 for the English report and pp. 356-366 for the French report.

²⁷ Cass. Civ. 28.11.1968, JCP 1969.II. 597.

²⁸ See Viarlard, "*L'Offre Publique de Contrat*", R.T.D.C., 1971, 750, no. 38ff.

²⁹ But it is possible in English Law to formulate an advert or a price list in such a way as to make it clearly an offer. For example, where from circumstances and words used it is clear that the advertisers or sender of price list intended to be bound: *Carlill v. Carbolic Smokeball Co.* [1893] 1 Q.B. 526, where it was held that the intention to be bound was made particularly clear by the statement that the advertisers had deposited £1.000 in their bank.

³⁰ See Cass. Civ. 28.11.1968, *Op. cit.*, note 27.

³¹ Treitel, p. 12.

³² Schlessinger, *op. cit.*, note 9, p. 79.

Mokake v. Brasseries du Cameroun³³ illustrates, the consequences of that distinction is far from academic. Because I shall be referring to this case many more times, it is important that I set out the full facts now. The plaintiff ran an off licence bar while the defendant was, and still is, the major brewery in Cameroon. Between 1970 to 1974, the defendants supplied the plaintiff with drinks which the latter sold on a commission basis. The drinks were always supplied at the plaintiff's off licence premises. Sometime in 1974, the plaintiff alleged that the defendants had supplied him with unwholesome beer, some of which he had drunk himself and been taken ill as a result. The plaintiff made a formal complaint to the Department of Health and other relevant administrative authorities. The defendants refuted these allegations even though it was found as a fact, by the health inspector, that some bottles of beer actually contained foreign substances. Thereafter, the defendants discontinued supplies to the plaintiff, whereupon he brought an action of breach of contract.

Several issues were raised in this case, some of which will be considered in due time, but the discussion here is limited to the distinction between offer and invitation to treat. The defendants denied that there was any contract at all between the plaintiff and themselves. They maintained that they used their trucks to supply drinks not only to the plaintiff but to other customers as well, and that the arrival of their trucks with drinks and their plying for trade was merely an invitation to treat which the plaintiff had to take up if he wished by making an offer to buy. The trial judge rejected this argument and held that the defendants were in breach of contract for which the plaintiff was entitled to damages.

The Buea Court of appeal saw it differently. It agreed with the defendants' contention that the visits of their vehicles with drinks to various customers was merely an invitation to treat and that there was no pre-existing and continuous

³³ CASWP/14/79 (Buea, 19-12-1979, unreported). This is one of the most litigated contract cases in common law Cameroon. It spanned the complete court structure, starting from the Buea High Court (HCSW/35/75, unreported), to the Buea Court of Appeal, then the Supreme Court (C.S. Arrêt No. 25/CC du 28 Octobre 1982, (1983) 25 Rev. Cam. Dr., 62) which in turn remitted it to the Bamenda Court of Appeal (BCA/36/83). It was explained in chapter one that it is normal for the Supreme Court, which is a court of cassation to remit cases of common law origin to the other common law court of appeal.

contract between the parties. The decision of the trial court was thus set aside. The conclusion reached by the Court of Appeal may well be in line with two established rules of English law on the subject, namely: that any statement or request lacking in the intention to be bound is merely an invitation to treat and secondly that, the display of goods is merely an invitation to treat, not an offer. Yet it is submitted that (i.e. if one must take the view that there was no contract) a better analysis of this case would have been to consider that the defendant brewery had made a standing offer to supply drinks to the plaintiff but that they were perfectly entitled to withdraw this offer anytime before acceptance. In other words, the defendant did make an offer but withdrew it before the plaintiff accepted and therefore could not be held to be in breach of contract.

My view on this is that there are good reasons for holding, as the trial judge did, that there was a contract. I shall advance these reasons when I consider the problems relating to offer and acceptance and the doctrine of consideration in subsequent sections.

There appears to be no instances in which the courts in Civil Law Cameroon have ruled that a certain act amounted to an invitation to treat as opposed to an offer. In **Ste. Balton-Cameroun v. Bouga**, the appellants' attempt to draw on the distinction between offer and invitation to treat to the effect that what had transpired between the parties amounted to no more than an invitation to treat was forcefully rejected by the Supreme Court; but the case does reveal that the distinction is also recognised in Civil Law Cameroon. Perhaps the courts in Civil Law Cameroon have adopted the attitude of their French counterparts, whereby they are more inclined to hold that a proposal amounts to an offer rather than an invitation to treat.

3. CONCORDANCE BETWEEN OFFER AND ACCEPTANCE.

As a general rule both in English and French law, an acceptance, in order to bring about a contract, must comply with the offer (i) as to the terms of the offer, (ii) as to the manner of assenting to the offer (if prescribed) and (iii) as to the time allowed

for acceptance.

(1). Compliance with the terms of the offer.

In English law, a communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer.³⁴ An acceptance not in conformity with the offeror's terms, would be a qualified acceptance, operating in many circumstances as a cross or counter offer, which the original offeror may accept or reject. For this reason, the line of demarcation between qualified and unqualified acceptance is of great importance, although the tracing of that line is not always easy and free from doubt.

It is also a requirement in French law that the acceptance complies with the terms of the offer.³⁵ Any real variance or reservations contained in the alleged acceptance destroys its character.³⁶ This rule also finds support in the *Avant-Projet* of the revised French Civil Code: When an offer is accepted with modification or subject to reservations, the acceptance shall be considered only as a new offer.³⁷ In French law too, it is not always easy to draw a fine line between qualified and unqualified acceptance.³⁸

This issue of compliance between the terms of offer and acceptance does not seem to have come before Cameroonian courts but one would expect them to follow the

³⁴ *Tinn v. Hoffman & Co* (1873) 29 L.T. 271; *NorthWestern Leicestershire D. C. v. East Midlands Housing Association* [1981] W.L.R: an offer to pay a fixed price for building work is not accepted by a promise to do the work for a variable sum.

³⁵ Planiol & Ripert, vol.6 (ed. Esmein), para. 99; Weill & Terré, para. 146; Ghestin, para. 224.

³⁶ Mazeaud (ed. Chabas), *Obligations*, para. 138; Weill & Terre, para. 146; Ghestin, para. 226-1.

³⁷ *Travaux* 1948-1949 at 705

³⁸ See Rieg "La Punctuation", Contribution à l'étude de la formation successive du contrat, In: *Mélanges Jauffret*, 1974, pp. 593 et s. He asks whether compliance must be complete and exact. In complex contracts he observes some conditions of offer may well be accepted while others may be reserved for further negotiation. At what point therefore, he asks, are the parties bound?. For discussion of this question, see, Weill & Terré, para. 146.

rules of the English and French law discussed above, if and when the matter comes before them. However, in the case of Civil Law Cameroon, some provisions of the Civil Code are very helpful in this regard. The fundamental rule of the interpretation of contracts, as set out in article 1156, is that one should "look for the common intention of the contracting parties rather than hold to the literal meaning of the terms".

But if the acceptor includes in his reply a condition necessarily implied by the law, it is most unlikely that the court would find anything that would rob the acceptance of its effectiveness. In the words of article 1135: "contracts give rise not only to those obligations which are stated therein but also to those which according to the nature of each agreement, are derived from equity, usage and law." Thus the addition of the offer of an obligation inherent in the law does not in any way change the effect of the contract proposed by the offeror.

(2). Compliance with the prescribed method of acceptance.

Where the offeror prescribes for a particular method of acceptance, he will not in general be bound unless acceptance is made in that way. This is true of both English³⁹ and French⁴⁰ laws.

But in the absence of any prescribed method, acceptance can take any form. Generally, the manifestation of acceptance may be express, implied or tacit. It may be express, such as by letter or telegram or by words or clear gesture. It may be implied when manifested by actions or inferred from the offeree's conduct as was the case in **Brogden v. Metropolitan Railway**.⁴¹ There is also the burning question as to whether silence can constitute acceptance. I will briefly elaborate on acceptance by

³⁹ See **Financing Ltd v. Stimson** [1962] 1 W.L.R. 1184, where an offeror who asked for acceptance in writing was held not bound by one that was oral.

⁴⁰ Aubert, para. 281; For a brief comparative account, see David and Pugsley: **Les Contrats en Droit Anglais**, 1985, pp.100-106.

⁴¹ (1877) LR. 2 A.C. 666

conduct and acceptance by silence.

(i) Acceptance by Conduct:

Acceptance by conduct was implied by the Bamenda Court of Appeal in **Bassum v. Youya**.⁴² It will be recalled that the defendant had asked the plaintiff to serve in his business, the terms being that the latter would not be paid any salary but would in the end be given a lump sum to enable him start his own business. It was held by the Court of Appeal, reversing the High Court, that the plaintiff's eight year service to the defendant amounted to an acceptance (by conduct) which led to a valid contract under which the plaintiff was entitled to recover. It should be noted that this case was decided in Common Law Cameroon.

As for Civil Law Cameroon, the Civil Code is instructive in the absence of any decided cases. As in France, it is a general rule in Civil Law Cameroon that acceptance may take any form, express or tacit. However, the Civil Code clearly lays down instances where the acceptance must be express or implied. In the case of formal contracts such as gifts, article 932 provides that the contract is formed only when it is accepted in express terms, and in the case of agency, article 1985 provides that acceptance of an agency may be only implied and result from the execution given to it by the agent.

(ii) Acceptance by Silence.

An important question relating to acceptance is whether silence can constitute acceptance. This question has attracted much debate,⁴³ especially in French law.⁴⁴ It is enough to state here that, as a general rule, both in English and French Law,

⁴² *Supra*, note 11.

⁴³ See Owsia, "Efficacy in Contract Formation: A Comparative Review of French and English Law" (1991) 40 I.C.L.Q. 784.

⁴⁴ See generally Yung, "L'acceptation par le silence de l'offre de contrat" In: Mélanges Secrétan, 1964, p. 334 ff; Littman, "Le Silence et la Formation du Contrat" Thèse, Strasbourg, 1969; Diener, "Le Silence et le Droit" Thèse, Bordeaux, 1971.

mere silence or inaction does not constitute acceptance.⁴⁵ An offeree who stays silent or does nothing on receipt of an offer cannot be bound even if the offer clearly stated that it may be accepted by silence.⁴⁶ Even the French proverb "*qui ne dit mot consent*"⁴⁷ does not seem to have any legal significance in this regard.

The decision in **T.C. Anomachi v. Emens Textiles International**⁴⁸ is illustrative of the fact that the courts in Common Law Cameroon observe the general rule that silence does not constitute acceptance. In that case, the appellant, a solicitor, alleged that he had oral discussions with the director of the respondent company during which it was agreed that he would be appointed a retainer agreement for the said company. Consequently, he drafted a retainer agreement and forwarded it to the respondents. The respondent never signed nor returned this document to him. In an action for breach, the Appeal Court, upholding trial court, dismissed the action on the grounds that no contract existed. The court explained that there had been no acceptance on the part of respondents, and added for good measure that their silence or failure to respond to the appellant's draft agreement could in no way amount to an acceptance.

I have not found any case in Civil Law Cameroon in which the courts have had to deal with the question of silence and acceptance and the Cameroonian Civil Code too does not directly address it. It is to be expected that when confronted with the problem, they will follow the general rule in French law, which is that silence does not constitute acceptance.

Both English and French law allow certain exceptions to the general rule. In English law it is accepted that in exceptional cases or where the circumstances of the

⁴⁵ For English Law, see Treitel, p. 30, and Cheshire, Fifoot, and Furmston, p. 47. For French law, see Aubert, para. 313; Planniol & Ripert (ed. Esmein), para. 188; Nicholas, p. 72.

⁴⁶ See the English case of *Felthouse v. Bindley* (1862) 11 C.B. (N.S.) 869, and the decision in the French case of Cass G. V. 25 Mai 1870, S. 70.1.341 where the defendant who had failed to respond to a letter from his bank informing him of shares that had been offered to him was held not to be bound for want of acceptance, since in law, the silence of a person one intends to be bound contractually, does not suffice, in the absence of all other circumstances, as proof of the alleged obligation against that person.

⁴⁷ Weill & Terré, para. 130.

⁴⁸ CASWP/1/73 (Buea, 16.4.1973, unreported).

case are such that acceptance can be inferred from the silence, the offeree will be bound notwithstanding his silence.⁴⁹ In **The Leonidas D**,⁵⁰ the House of Lords had to consider an appeal from a decision that a binding agreement should be inferred from silence and inaction. Their Lordships confirmed that a silence and inaction can give rise to both offer and acceptance under special circumstances but pointed out that no such circumstances were present in that case to justify a departure from the general rule that silence does not constitute acceptance. Also, in the much earlier case of **Robert v. Hayward**,⁵¹ a tenant who accepted his landlord's offer of a new tenancy at an increased rent by simply staying on the premises was held to have accepted his landlord's offer by silence.

In France, it has been accepted that room for exceptions to the general rule is implied in the statement of the court in the case of Civ. 25 Mai 1870, that its decision applied "*en l'absence dans toutes autres circonstances*". It has been further been pointed out⁵² that certain articles of the French Code (and by analogy the Cameroonian Code) can be construed as exceptions to the general rule that silence cannot constitute acceptance. Articles 1738 and 1759 which are to the effect that when a written lease or tenancy expires, and the lessee or tenant continues to occupy the premises without any objection from the landlord, that will be considered as a tacit renewal of the tenancy agreement, are cited as examples.

The decision in **Robert v. Hayward** shows that English law too adopts a position that is very similar to that laid down by articles 1738 and 1759 of both the French and Cameroonian Codes. But it is arguable that the above case and the instances cited in articles 1738 and 1759 would be better explained in terms of acceptance by conduct rather than acceptance by silence. In **Robert v. Hayward**, for instance, it

⁴⁹ See Treitel, pp. 31-32.

⁵⁰ *Allied Marine Transport Ltd. v. Vale Do Rio Doce Navegacao S.A. (The Leonidas D)* [1985] 1 WLR. 925.

⁵¹ (1828) 3 C & P. 432,

⁵² Weill & Terre para 130; Planiol & Ripert (ed Esmein) para 109

would have been better to say that the tenant accepted by conduct and the landlord waived his right for an express acceptance.⁵³

It is interesting to note in the light of the above comments that the decision in the more recent case of **Rust v. Abbey Life Assurance Co.**⁵⁴ was rationalised in terms of acceptance by conduct, and not by silence. The plaintiff applied for certain property bonds in the defendant's company. They were allotted to her immediately but signed and sent to her about three weeks later. The matter rested for some seven months until the price of bonds fell in the market and the plaintiff sought repayment of her investment by alleging, *inter alia*, that no contract had existed.

It was held at first instance that the contract was concluded, and that decision was affirmed by the Court of Appeal. Brandon, L.J, delivering the appellate judgement, had this to say:

"it seems to me to be an inevitable inference from the conduct of the plaintiff in doing and saying nothing for seven months that she accepted the policy as a valid contract".⁵⁵

There is one significant difference between English and French law on the question of acceptance by silence which must be briefly mentioned here. It is a rule in French law that a person who remains silent in response to an offer, which is entirely beneficial to him, can be assumed to be assenting to it. English law, on the other hand, will not give effect to such an offer because of lack of consideration.⁵⁶ This rule of French law was established in 1939⁵⁷ and reconfirmed in another case in 1969.⁵⁸

⁵³ Treitel, p. 33.

⁵⁴ [1979] 2 Lloyd's Rep. 334.

⁵⁵ *Id* at 340.

⁵⁶ For a brief comparative discussion of this rule, see De Moor, "*Contract and Agreement in English and French Law*" (1986) O.J.L.S. 278.

⁵⁷ In the case of Cass req 29.3.38, S, 1938, 1, 380, also cited in Khan Freud: **Source-book in French Law**, 1979, p. 334.

⁵⁸ Cass G. V. 1.2.1968, D. 1970. 422, note Puech; Kahn Freud, **Sourcebook**, p. 335.

In the latter case a passer-by was injured by the burning flames of a motorcycle as he tried to help the cyclist who was lying unconscious after a collision with a car. It was held that the passer-by had intervened by virtue of a contract between himself and the motor cyclist, so that he was entitled to contractual damages for his injuries. The motor cyclist argued on appeal that there could not have been any contract, especially as the trial court had not pointed to any acceptance by him of the plaintiff's offer of assistance. Affirming the decision of the lower court, the *Cour de Cassation* ruled that there was no need to point to any express acceptance, since the address of an offer which is made in the offeree's exclusive interest is presumed to have been accepted by him. Even though this decision has been criticised,⁵⁹ it clearly lays down the rule in French law.

3. Compliance with time.

Acceptance, in order to bring about the formation of a contract, must be made while the offer is open. If a particular period of time is prescribed by the offerer, acceptance must be made within that period. In the absence of any fixed period of time, the offer is expected to remain open for a reasonable period of time within which acceptance must be made. Whatever is the case, acceptance must be made before the offer is terminated. Both in English and French law, an offer can be terminated in one of the following ways, lapse of time, death of one of the parties, rejection or cross offers, insanity or incapacity and by revocation.

The emphasis here will be only on termination by revocation because of some of the difficulties that it gives rise to and because of the different approaches adopted by English and French law.

⁵⁹ Ghestin (para. 298), argues that to give contractual effect to such an offer is to give effect to a will which is non-existent or fictive; and according to Nicholas (p. 73) the construction of the act of a passer-by as an offer is very artificial.

4. REVOCATION OF THE OFFER

In English law, the general principle is that every offer regardless of its terms can be revoked at anytime before it is accepted and it is immaterial that the offer is expressed to be open for a given time or not.⁶⁰ This rule that gives the offeror total freedom to retract the offer before acceptance is inextricably linked to and best explained by the English law doctrine of consideration.⁶¹

An offer therefore becomes irrevocable if it is supported by consideration, is under seal, or where there has been some reliance⁶² or where a special statute makes it irrevocable.⁶³ It is evident from the decision in **Nangah v. Asonganyi**,⁶⁴ that the courts in Anglophone Cameroon will not approve of a revocation by the offeror if some consideration has been furnished by the offeror or if there has been part performance. In that case, the defendant offered to sell a building to plaintiff for 10 million francs. The plaintiff agreed to buy the building and proceeded to make an advance payment of 3 million francs. When the defendant later attempted to revoke his offer, the plaintiff sued, asking the court for an order for specific performance. It was held that the defendant could not revoke his offer as the plaintiff had already made an advance payment of a third of the asking price.

In Civil Law Cameroon, the general rule also is that an offer is normally revocable before acceptance, if the offeror does not provide for any period of

⁶⁰ *Byrne v. Leon van Tienhoven* (1880) C.P.D. 344; see also *Routledge v. Grant* (1828) 4 Bing 653.

⁶¹ See chapter 6 below.

⁶² For e.g. *Lloyd v. Stanbury* [1971] 1 W.L.R. 535, where a person who had offered to sell land was accordingly held liable for certain expenses incurred by the offeree in reliance on the offer. See also *Anglia Television Ltd. v. Reed* [1972] 1 Q.B. 60.

⁶³ For example, the (English) Companies Act 1985, s. 82 (7); and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) Art. 5(1).

⁶⁴ HCB/79/85 (Bamenda, 23.1.1987, unreported).

irrevocability. This rule is not expressed in any statutory provision,⁶⁵ but it is unanimously upheld by leading French writers⁶⁶ and the courts.

Up to this point there is no difference between English and French law. The main difference occurs with respect to offers expressly stated to be irrevocable. While English courts accept the revocation of an offer even if expressly stated to be open for a given time, French courts will not sanction or approve such a revocation. In **Isler v. Chastan**⁶⁷ with facts very reminiscent to the English case of **Routledge v. Grant**,⁶⁸ the French *Cour de Cassation* declared that while an offer may in principle be revoked as long as it has not been accepted, the position is different where the offeror has expressed or implied an undertaking not to revoke before a certain time and that, the offeror having tacitly obliged himself to keep the offer open (until the offeree has made his inspection), could not have revoked his offer on the day alleged without committing a fault of a kind which will entail liability on his part.

Under the French system, therefore, an offeror may withdraw his offer before the expiration of the time he allowed for acceptance but any such untimely or premature withdrawal may render him liable in damages. Even if the offeror prescribes no set period for acceptance he is still bound to keep it open for a reasonable time. If an offer is revoked before a reasonable time elapses or before the end of a prescribed time of acceptance, no contract is formed, technically speaking, since there can be no acceptance. But the offeree can claim compensation for the loss which the

⁶⁵ But art. 932 of the Civil Code providing that "a gift inter vivos binds the donor and has effect only as from the day it is expressly accepted", implicitly establishes the rule that an offer of a gift may be revoked, but this provision it is acknowledged, cannot be extended to all contracts.

⁶⁶ One may cite for example, Aubry, Rau, and Bartin, *Obligations*, para. 343: "Since an offer is insufficient of itself to bind him who made it, it may generally be revoked"; Planiol & Ripert (ed. Esmein), para.131; Mazeaud/Chabas, para. 135.

⁶⁷ Cass civ. 17.12.1958, D.1959, 33; Kahn- Freund, *Sourcebook*, p. 328.

⁶⁸ (1828) 4 Bing 653.

premature revocation caused him.⁶⁹

Three main theories have been advanced to justify the offeror's liability for revocation in these circumstances.⁷⁰

According to one - the abuse of right (*abus de droit*) theory - the offeror when withdrawing the offer may incur a certain responsibility of a quasi-delictual nature that entitles the offeree to recover damages for the detriment he suffers when through reliance on the offer, he makes the preparation to perform. This theory is based on article 1382 of the French Civil Code: "any act whatever of man which causes damages to another obliges him by whose fault it occurred". It follows from this that the offeree cannot obtain damages unless he proves, in addition to revocation, a fault committed by the offeror.

The second theory - the preliminary contract theory⁷¹ - holds that the offeror offers not only to enter the principal transaction but also a preliminary contract which binds him to keep the principal offer open for a certain time. This preliminary offer being purely advantageous for the offeree, is concluded by tacit acceptance. If the offeror then withdraws the offer to enter the principal transaction, he is liable in damages for breach of the preliminary contract.⁷² It has been suggested that this

⁶⁹ See the oft-cited case of *Jahn v. Mme Cherry*, Bordeaux 17 Jan. 1870 S.1870.2.219; See also Schlessinger, p. 771; The *Minguet* case: Cass. 8 Oct. 1958 Bull.1.331 is also pertinent, cited in Schlessinger, p.770.

⁷⁰ For further details of these theories, see generally Weill & Terré, para. 139; Planiol & Ripert (ed. Esmein), para. 132; Ghestin, para. 217.

⁷¹ Demolombe, *Cours de Code Napoléon*, T. XXXIV, Nos. et s., p. 48 et s., is credited with the formulation of this theory. See Aubert, para. 105

⁷² The CA at COLMAR used this theory in a case where a subcontractor who had based his offer on an error of calculation had withdrawn it after the offeree had used it as a basis for a successful tender. The court held that an offer was binding '*dès lors qu'il résulte d'un accord exprès ou tacite, mais indiscutable, qu'elle a été formulée pour être maintenu pendant un délai déterminé*', but found that in the case before it no such agreement was proved. When the offeror made his offer, he did not know that the offeree was intending to use it as a basis for making a tender. (Colmar, 4 Feb. 1936, DH 1936, 187).

theory should be likened to the concept of *culpa in contrahendo*,⁷³ of German origin.

The third theory - the unilateral declaration of will theory⁷⁴ - attributes binding effects to unilateral declaration of wills. According to it, the will alone suffices to give rise to an obligation and therefore the will should be incorporated in the traditional lists of the sources of obligations. This theory has been criticised on the doctrinal grounds that there is no such institution as "*engagement unilatéral*" in French law.⁷⁵

Of the three theories, French courts seem to prefer either the theory of 'abus de droit' or the preliminary contract theory. But what is important, irrespective of the theory that one adopts, is that French case law and doctrine agree on the conclusion that an offer has to be maintained by the offeror during a certain period of time.⁷⁶

While the courts in Civil Law Cameroon too can be expected to hold an offeror liable for untimely revocation, it is difficult to say which of these theories they will adopt as the basis for the offeror's liability. In fact, it is doubtful if they will give much thought to such theoretical justification. Not that it matters. What actually matters in Cameroon is not very much the basis of the rule but the rule itself.

From what precedes above, it is obvious that there is a major difference between

⁷³ Schwenk, "*Culpa in Contrahendo in German, French and Louisiana Law*" (1940) 15 Tul.L.R. 87 at 94. According to this concept, which was formulated by Rudolf von Ihering, when two parties start negotiations they enter into a pre-contractual connection of an innominate kind and tacitly concluded whereby a relationship of confidence arises, imposing on the parties a duty of diligence in regard to the other party's reliance. This theory has since greatly influenced French doctrine and jurisprudence (see Planiol & Ripert (ed Esmein), Part I 152 para. 2.0 It must be noted, however, that *culpa in contrahendo* is unnecessary in matters of revocation of offers in German law, as the BGB expressly pronounces that offers are irrevocable (see Schwenk, p. 91).

⁷⁴ Worms, *La Volonté Unilatérale Considérée Comme Source d'Obligation*, p. 165 et s., is said to have been the principal exponent of this theory. See Aubert, para. 105

⁷⁵ Weill and Terre, para. 139(a): "*notre jurisprudence a toujours manifesté de la réticence à admettre la valeur de l'engagement unilatéral comme source d'obligations*".

⁷⁶ This position was also taken by the commission charged with the reform of the French Civil Code. In article 11 of the Avant Projet of "Sources and Formation of Obligation", it proposes a rule whereby offers stated to be open for a certain period of time could not be withdrawn until that period elapsed unless the withdrawal reached the offeree before the offer. The same rule was to apply when a period during which the offer was to remain open could be inferred from the circumstances. See Travaux de la Reforme du Code Civil, 705 1950, A. von Mehren, *The Civil Law System*, 1957, p.479.

Common and Civil law Cameroon on the question of revocation of an offer. In Common Law Cameroon, subject to the doctrine of consideration, part performance or reliance, an offer can be revoked anytime before acceptance without the offeror being liable. In Civil Law Cameroon, on the other hand, no consideration or part performance is needed in order that the offeror be held liable for revocation. As usual, this difference can be of practical significance in the case of conflict of laws. It is not impossible to imagine a situation in which an offeror may be held liable for revocation in one part of the country (civil law) while he is not liable in the other part (common law).

It is yet to arise in Cameroon so I have had to rely on the Canadian case of **Renfrew Flour Mills v. Sanschagrín**⁷⁷ to make the point. The Renfrew Mills, in Ontario, offered to sell flour to Sanschagrín, who lived in Quebec. The offer stipulated that it was to be accepted within eight weeks "otherwise this offer is to be withdrawn". Before the expiration of the eight weeks, the offeror wrote saying: "Please consider our offer... withdrawn". Sanschagrín protested, and placed an order for the quantity of flour stated in the offer. Not receiving delivery, he sued for damages. The Court of Appeal held that the law of Ontario (common law) applied to the transaction⁷⁸ and that the principle applicable was that the offeror could retract his offer even before the time he expressly allowed for acceptance, if no consideration had been given for the promise. There having been no consideration, Renfrew Mills were entitled to have withdrawn their offer.

This is of course the classic common law position.⁷⁹ Had it been that the law of Quebec (civil law) governed the transaction, Renfrew Mills may well have been held liable for their untimely revocation. It is suggested that were such a case to arise in Cameroon, it should be approached in the same way as the Renfrew case i.e. by first determining the applicable law before deciding the question of revocation.

⁷⁷ [1928], 45 K.B. 29 (Que. C.A.).

⁷⁸ Because the offer had been communicated in Ontario.

⁷⁹ See *The Albeko*, *infra*, note 108.

It must be said that the civil law rule whereby the offeror is held liable for untimely revocation (especially as explained by *abus de droit* theory) is more responsive to commercial and practical realities than the rule in common law Cameroon whereby the offeror can revoke with impunity without being liable, as long as he does so before acceptance. In fact this common law rule does present some difficulties and has been subject to some serious criticisms.⁸⁰

Particular difficulties of this rule are best illustrated in the case of unilateral contracts where a performance is executed for a promise. Suppose, for example, A promises B one million francs CFA if B climbs Mount Cameroon. Suppose B subjects himself to considerable strain to accomplish this feat. Can A retract his offer after B has already done much of the climbing. On the common law principle, it is clear A has a legitimate right to do so since the offer has not been fully accepted. This is so because, technically speaking, an acceptance is only complete when the act is fully performed. Yet there is no doubt that B has suffered some detriment or hardship or loss. Is he therefore not entitled to any remedy whatsoever ?

There is evidence to suggest that in the case of unilateral contracts, the courts in Common Law Cameroon will treat the offer as irrevocable once the offeree has started to comply with the requested performance, for it is reasonable to presume an undertaking on the part of the offeror to be bound by his offer once performance has begun. Although **Bassum v. Youya**⁸¹ is not a classic "I will pay you a hundred pounds if you will walk to York" case, it is instructive here since it is concerned with a unilateral contract. A promised to pay B a certain block sum if B would work for him. B did work for A for several years. In an action by B for the promised sum, the Bamenda Court of Appeal held that he must succeed. Even though the court did not think it was making any specific pronouncement on the revocation of offers, this decision nevertheless establishes the fact that A could not retract his offer or renege

⁸⁰ The (English) Law Reform Committee 1937 proposed that it be abolished. It was again examined by the Law Commission 1975 in Working Paper no. 60. In some special cases, legislation intervened to make offers irrevocable. For example, Companies Act 1985, s. 82 (7). But this has since been partially repealed (*in relation to listed securities*).

⁸¹ *Supra*, note 11.

on his promise after B had acted on it. This decision is laudable because it allows commonsense to prevail over strict law. It is thus hoped that the courts will consistently adopt such a position in order to circumvent any harshness that a strict application of the common law rule (whereby an offer can retract his offer anytime before acceptance) may cause.

5. SOME CONCEPTUAL DIFFICULTIES OF OFFER AND ACCEPTANCE

The formation of contract by offer and acceptance, although axiomatic, has long been a source of conceptual difficulty.⁸² The classical test of offer and acceptance, as briefly analyzed above, is based on three basic presumptions: that two parties or group of parties are involved in making the contract; that their respective expressions are capable of being reduced to corresponding definite propositions, each determinable at a given time; and that, the propositions so reduced, sequentially follow each other to produce the contract.

In certain situations, however, these assumptions may not hold true. In such cases, if the courts still persist, as they very often do, in their adherence to the classical doctrine, the result may not only be artificial and unrealistic, but may be grossly unfair. For this reason, the classical doctrine of offer and acceptance as a mechanism for contract formation has therefore come under increasing criticism both in French and English law.

In France, modern doctrinal view has come to recognize that the differentiation of offer and acceptance on the basis of the chronological sequence of the parties expressions of wills, is not always easy to make. Neither is it possible to reduce agreement in certain complex transactions to offer and acceptance. Some writers consider the traditional offer and acceptance to be a somewhat arbitrary oversimplification and point out that only in simple everyday transactions, is a contract

⁸² See generally Lucke, *"Striking a Bargain"* (1962) 3 Adel. L. R. 293.

concluded by the simple acceptance of the offer.⁸³ It has thus been argued that while a contract results, in normal situations, from a sequence of an offer and an acceptance, it is equally certain that such a mechanism is not indispensable.

The sequential order of offer and acceptance has also come under attack in England from both academic writers and the courts. As Atiyah puts it,⁸⁴

"... to insist on the presence of a genuine offer and acceptance in every case is likely to land one in sheer fiction, although it may be convenient to postulate the existence of an offer and acceptance for some purposes".

And Lord Denning has expressed his dislike for the classical offer and acceptance analysis, which he attributes to textbook writers, in the following terms,⁸⁵

"I do not much like the analysis in the textbook of inquiring whether there was an offer and acceptance, or a counter offer or so forth."

Despite these criticisms, there is still a persistent judicial adherence to the doctrine, often at the cost of forcing the facts to fit uneasily into the marked slots of offer and acceptance. Not surprisingly, Cameroonian courts have also been guilty of this charge. The problem that this raises is not only of theoretical interest, but also has practical consequences as to whether a contract was ever concluded and especially as to the distinction between offer and an invitation to treat.

This point may be illustrated by referring again to the case of **Mokake Elali v. Brasseries du Cameroun**,⁸⁶ where it will be recalled, the defendant brewery succeeded in convincing the Court of Appeal that the delivery by their lorries of drinks to the plaintiff was only an invitation to treat. It followed from that no

⁸³ 2 Ripert & Boulanger, *Traité de Droit Civil*, 1957, para. 321; and Carbonnier (para.38), despite employing the offer/acceptance analysis, has nevertheless criticised it by arguing that the contracting party who had the contractual initiative is not necessarily the one from the first manifestation of the will derives.

⁸⁴ Atiyah, *An Introduction to the Law of Contract*, 1989, p. 61; For similar caution, see Anson (Guest ed.), 1984, p. 22.

⁸⁵ In *Port Sudan Cotton Co. v. Govindaswamy Chettiar & Sons* [1977] 2 Ll.Rep. 5, at p. 10.

⁸⁶ *Supra*, note 33.

contract existed for which the defendants could be held liable in breach as the plaintiff was alleging. The attempts by the trial court to find in favour of the plaintiff by the use of concepts such as reliance and estoppel received short shrift from the Court of Appeal, which thought it enough to dispose of the case largely on the basis that the plying of vehicles by the defendant brewery amounted to no more than an invitation to treat.

It is not suggested that the court was entirely wrong to subject the facts of this case to the classical offer and acceptance analysis. Yet, one cannot help but feel that by ignoring the course of dealing of the parties and the reliance by the plaintiff on the defendant's custom, the Appeal Court placed undue emphasis on the offer and acceptance doctrine, precisely on the distinction between offer and invitation to treat. To accept the defendants' submissions that the plying by their lorries of drinks did not amount to an offer but only an invitation to treat, is perhaps stretching that distinction too far.

Again, in **Churchill Achu v. Azire Co-operative Credit Union**,⁸⁷ the Bamenda Court of Appeal tried too hard to employ the offer and acceptance analysis. The plaintiff, a businessman, was a member of the defendant co-operative society between 1983 to 1988. During that period he took out a number of loans which were duly repaid. Then in 1987 he won a contract to supply motorcycles to MIDENO, a development agency.

In order to perform this contract, he applied for a loan from the defendants. The defendants asked for, and received, confirmation of the said contract from MIDENO, plus an assurance from MIDENO that in the event that the deal went through, they (MIDENO) would pay the contract price direct into the plaintiff's account with the co-operative society. But events were to take a different turn. Not only was the plaintiff's loan application rejected for alleged irregularities in the application and insufficient security, he was also dismissed as a member of the society. He sued for breach of contract. It is not clear whether he based his action on the termination of

⁸⁷ BCA/6/90 (Bamenda, 11.1.1991, unreported).

his membership or on the refusal to award him the loan or both. In any case, the Bamenda High Court found for him and awarded him the generous sum of fifty million francs CFA in damages. The co-operative society appealed.

The Court of Appeal took the view that the plaintiff could only have been suing for the rejection of his loan application. On that interpretation, the Appeal Court held, overruling the High Court, that he could not succeed since there was no contract, there being no offer and acceptance. Of course, there was as yet no contract but was not necessary for the court to employ the offer and acceptance doctrine to arrive at that conclusion.

It is respectfully submitted that there are better ways at arriving at the same conclusion. For a start, it is trite that the defendants, like any other financial institution, are under no contractual obligation to accord loans to its members. Then, there are two other ways of looking at the case. The first one relates to the question of reliance on which the trial judge based his judgement. Was the fact that the co-operative society asked for confirmation of the contract and for an assurance that the contract price would be paid directly to them, as well as appointing a high level committee (it included the general manager and his assistant) to look into plaintiff's contract with MIDENO, enough to entitle the plaintiff to invoke the doctrine of reliance? And could the co-operative society in any way be considered to have given an irrevocable commitment to grant the loan? If the answer to these questions is yes, then the plaintiff must have a good case, and this is irrespective of whether offer and acceptance are clearly discernible.

On the other hand, if there was no detrimental reliance and the rejection of the loan application was in the view of the court, based purely on the lack of merit, then the plaintiff must fail. Again, irrespective of offer and acceptance.

Unlike the **Mokake v. Brasseries du Cameroun**, no injustice can be said to have been done in this case since the court rightly held that there was no contract. The case is cited only to emphasise the point that Cameroonian courts too, may at times be carried away by an over-enthusiastic application of the offer and acceptance doctrine.

As already mentioned above, there is increasing criticism in France and England of the traditional analysis. Chief amongst the critics is Lord Denning. In **Gibson v. Manchester City Council**,⁸⁸ he declared: "To my mind it is a mistake to think that all contracts can be analyzed into the form of offer and acceptance." He has even gone further to suggest that the traditional offer and acceptance analysis is "out of date"⁸⁹ and has attempted to replace it with what may be termed an unslotted mechanism.

It is not and cannot seriously be suggested that the offer and acceptance analysis should be abandoned in Cameroon. After all, the majority of contracts in Cameroon are two party contracts that readily admit of the offer and acceptance dichotomy. In such cases, the offer and acceptance mechanism is most useful. What is suggested is that the Cameroon courts of both systems should be willing to recognise and acknowledge instances such as complex business transactions involving many parties and standard form contracts⁹⁰ that deviate from or defy the doctrine. To deny the existence of a contract in such cases simply because the facts cannot be manipulated into offer and acceptance slots or to undertake such an artificial or arbitrary distinction between an offer and an invitation to treat, as the Court of Appeal did in **Mokake v. Brasseries du Cameroon**, may work great injustice at times.

6. THE TIME AND PLACE OF CONTRACT FORMATION

If the offer and acceptance takes place at the same time or at the same place (i.e. the parties are *inter praesentes*) English and French law both agree that the contract is formed at the moment the acceptance is signified. However, the questions as to

⁸⁸ [1978] 1 W.L.R. 520, 523.

⁸⁹ *Butler Machine Tool v. Ex-Cell-O Corp.* [1979] 1 W.L.R. 401, 404.

⁹⁰ For problems in these area, see generally Von Mehren, "The Battle of Forms": A Comparative View" (1990) 38 A.J.C.L. 265; Adams, "The Battle of Forms" (1979) 42 M.L.R. 715; For contracts of adhesion in French law, see Rieg, "Contrat Type et Contrat D'Adhésion" Trav. et Rech., Inst. Dr. Comparé, Paris, t. XXXIII, 1970; Berlioz, *Le Contrat d'Adhésion*, 1976.

when and where a contract is formed become important in the case where the offer and the acceptance take place at different moments or different places (i.e. the parties are *inter absentes*). Since the reasons for their respective importance vary, they shall be treated separately.

(1). The Time of Contract Formation.

It is important to determine when the contract is formed by the offeree's acceptance not only because of its unavoidable relation to the problem of revocability, but also because it relates to matters of capacity, transfer of title and the problem of risk. It may also be important in determining which law is to apply in cases where the law is changed while the contract is under negotiation. The problem is less than straightforward in the case of contracts between distant parties. The archetypal case is a contract by correspondence.⁹¹ What if the offeror and offeree, who are respectively based in the common and civil parts of law of Cameroon elect to communicate by mail? At what moment is the contract to be considered concluded?

At common law, in matters of correspondence, the leading case of **Adams v. Lindsell**⁹² set up the general rule that a postal acceptance takes effect when the letter of acceptance is posted. Several reasons have been advanced to support the rule,⁹³ none of which can be said to be overwhelmingly convincing, so that a whole set of controversies is presented under this rule.⁹⁴

⁹¹ Although every contract made by parties who are not face to face is a contract *inter absentes*, contracts *inter absentes* are not necessarily contracts by correspondence. For a discussion on this subject, see Asher Kahn, "Contracts by Correspondence" (1957-60) vols. 1-4 McGill L.J. 98-126 at 99-101.

⁹² (1818) 1 B & Ald 681

⁹³ One is that the offeror must be considered as making the offer all the time that his offer is in the post, and that the agreement therefore between the parties is complete as soon as the acceptance is posted. See *Henthorn v. Fraser* [1892] 2 Ch. 27, 33.

⁹⁴ Evans, "The Anglo- American Mailing Rule: some problems of offer and acceptance in contracts by correspondence" (1966) 15 I.C.L.Q. 553.

Some consider the rule arbitrary,⁹⁵ while others have pointed to its other apparent shortcomings, such as making the offeror bound without knowing whether or not the offer was accepted, making a seller who sells his goods to a third party after waiting for a reasonable time for an answer liable for damages when acceptance was delayed or lost in the post and, worst of all, creating a contract even if the offeree withdraws his letter from the post office or prevents its delivery to the offeror⁹⁶ or if it is lost through an accident in the post.⁹⁷ These shortcomings notwithstanding, the rule does serve a useful function in that it limits the offeror's power to revoke his offer with impunity.

In French law, various theories have been advanced to pinpoint the moment of formation. Two of these theories (declaration and expedition) contend that the contract is formed before the arrival of the letter of acceptance while the other two (reception and information) assert that the contract is formed only when that letter arrives at its destination.

There is no article in the French Civil Code directly supporting any of these theories. These theories have been criticised on different grounds and none can be said to be the clearly established theory. In fact, it has been argued that no general rule can be laid down and that the answer to the question when acceptance becomes effective can and should vary according to the facts, the nature of the contracts, the interests involved and the intention of the parties.⁹⁸

The *Cour de Cassation* has not adopted any of the theories outright,⁹⁹ whereas the court of appeal and other lower courts, when dealing with the question of time and not place of contract formation, have allowed their decisions to be governed by

⁹⁵ Treitel, p. 25.

⁹⁶ Nussbaum, "*Comparative Aspects of the Anglo-American Offer and Acceptance Doctrine*" (1936) 36 Col.L.R. 921

⁹⁷ *Household Fire and Carriage Accident Insurance Co. Ltd v. Grant* (1879) 4 Ex.D. 216, overruling *British and American Television Co. v. Colson* (1871) L.R. 6 Ex. 108.

⁹⁸ Schlessinger, p. 1450; Carbonnier, para.101(e); Weill & Terré, para.152.

⁹⁹ Colin et Capitant, para. 38; Planiol & Ripert (ed. Esmein), para.187.

equitable considerations.¹⁰⁰ It might be fair to say however, that on the whole the French courts have shown a tendency to apply the theory of reception to the question of when the contract is formed.¹⁰¹

In the absence of any decided cases on the subject of contracts by correspondence, one can only assume that the common law rule as laid down in *Adams v. Lindsell* will prevail, if and when the courts in Common Law Cameroon are confronted with the problem.¹⁰²

The position in Civil Law Cameroon is equally difficult to predict, partly as a result of the various theories that have been propounded in France, and partly because the Cameroonian Civil Code is silent on the matter. However, in *Sté SINCOM v. Sté Vacalopoulos*,¹⁰³ the question as to when a postal notice took effect was raised. A notice of service had been sent by registered mail to the counsel of one of the parties who later claimed not to have received it. Since the mail had been registered, the date of posting was recorded. That notwithstanding, it was held by the then East (French) Cameroon Supreme Court that a postal notice takes effect, not from the date of posting, but from the date of reception. Even though that case did not directly concern a contract by correspondence, it nevertheless dealt with the posting rule and is therefore pertinent to this inquiry. By ruling as it did, the Supreme Court can be said to have endorsed the reception theory so one may expect that theory to prevail in Civil Law Cameroon.

It follows from the foregoing analysis that both systems in Cameroon might provide different answers to the question of when a contract by correspondence is formed. This difference is potentially a source of conflicts. Potentially because, so far there does appear to be no case in which both systems have clashed on the issue

¹⁰⁰ cf. Planiol et Ripert (ed Esmein), para. 5.

¹⁰¹ For example, see Cass Civ. 21.72.1960, D. 1961 417, note Malaure; Kahn-Freund, *Sourcebook*, p. 345.

¹⁰² It must be remembered that as a pre-1900 decision, *Adams v. Lindsell* is binding on the common law courts in Cameroon.

¹⁰³ Arrêt No. 5 du 26 Fev. 1965 (1965) no.12 B.A.C.S.C.O. 1070.

of time in the formation of contracts. The reasons for the absence of any such cases are explained below under the sub-heading of place of formation. But the absence of actual litigation on the subject does not in any way dispense with the need for a brief discussion of the problem. I shall use a hypothetical case to analyze the problem.

Suppose X, in Buea (common law) sends by post an offer to sell goods to Y, in Douala (civil law), who posts back an acceptance which is lost in the post. By the (common) law in force in Buea, there is a contract because acceptance is effective on posting. By the (civil) law in Douala, there is no contract because acceptance is effective only on receipt. Which law is then to decide when or whether a contract was made?¹⁰⁴

There are scarcely any English authorities on choice of law rules to be applied in deciding whether the parties to an alleged contract have reached agreement.¹⁰⁵ It is proposed that if and when the Cameroonian courts are confronted with this problem, they should apply what is called the putative proper law as a solution.¹⁰⁶ On this approach the court will have to determine which law would be the proper law *in the objective sense* on the assumption that a contract was made.¹⁰⁷ If, in my hypothetical example, the offer had stated that the goods were to be delivered and the price paid in Douala, then no doubt, if a contract was made, the proper law would be the civil law, as the contract will be most closely connected with Douala, where civil law operates. Then civil law would be applied to decide whether there was a contract, with the result that there would not be, on account of the reception theory.

¹⁰⁴ Jaffey, *Offer and Acceptance and Related Questions in English Conflict of Laws* (1975) 24 I.C.L.Q. 603-616, discusses this problem.

¹⁰⁵ Jaffey, *Op. cit.*, note 104, 604.

¹⁰⁶ Dicey and Morris (*The Conflict of Laws* (9th ed.) rule 148, p. 763) favour this solution: "The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded".

¹⁰⁷ Cheshire & North, (11th ed.), p. 216.

This approach was used *obiter* in the *Albeko*,¹⁰⁸ the only English case so far on offer and acceptance in the conflict of laws. In that case, a Swiss company alleged it had posted a letter of acceptance for a contract of agency to an English company, the would be principal. The letter was never received and it was found as a fact that it had not been posted, with the result that there was no contract. Even though the finding that the letter had not been posted was enough to dispose of the case, Salmon J. went further to express the view that even if it had been posted, there would still be no contract, because under Swiss law (which would have been the proper law, the offer having been communicated there and the contract of agency to be performed there) a contract is concluded only when acceptance is received by the offeror.

It is acknowledged that the putative proper law approach is not without its difficulties.¹⁰⁹ First, it is not clear whether in ascertaining which is the putative proper law, account should be taken of an alleged choice of law in the supposed contract. Suppose an offer to sell goods is posted from common law Cameroon to an offeree in the civil law part, the goods to be delivered and the price to be paid in the civil law part, and the contract to be governed by the law in the common law. The offeree posts an acceptance, later changes his mind and cables a rejection, which the offeror receives first. Under common law there is a contract but under civil law there is not. Assuming that a contract was made, then its proper law would be the common law with the result that there would be a contract. But it seems both to beg the question and to be unjust to the offeree, to allow common law to decide that the parties reached the agreement, merely because the offeror claims that a contract was made including a provision that it should be governed by English law, when the

¹⁰⁸ *Albeko Schumaschinen v. Kanborian Shoe Machine Co. Ltd* [1961] 111 L.J 519. This same approach was followed in *Britannia S.S. Insurance Association v. Ausonia Assicurazione Spa* [1984] 2 Ll.R. 98, C.A., on the question whether a person signing a contract had the authority to do so.

¹⁰⁹ Libling, "Formation of International Contracts" (1979) 42 M.L.R. 169, criticises the accepted wisdom of the putative proper law and argues that the correct interpretation of such cases as the *Albeko* and *Mackender v. Feldia*), points to the importance of distinguishing questions of classification (governed by *lex fori*) and validity (governed by the putative proper law); For other difficulties of the putative proper law, see generally Jaffey, *Introduction to the Conflict of Laws*, 1988, p. 163 ff.

offeree denies that he agreed to any such thing. This may sound theoretical and has certainly not happened in Cameroon. Yet one cannot exclude the possibility of its arising someday.¹¹⁰

English courts have had to consider this particular difficulty with different conclusions. In **Mackender v. Feldia A.G.**,¹¹¹ Diplock L.J. thought that the question whether a contract had been made should not be decided by the law specified in a choice of law clause in the alleged contract, for if no contract had been made, it would follow that the law in question had not been agreed between the parties. In **The Parouth**,¹¹² on the other hand, the Court of Appeal seems to have accepted, *obiter*,¹¹³ that English law, as the law which would be the implied chosen proper law of the contract (because the alleged contract contained a proviso for arbitration in English) if it was made, should determine whether it was made. It should follow that if the alleged contract contained an express choice of law clause then that law should decide whether the contract was made.

It is suggested that the better view is that of Diplock L.J. in **Mackender v. Feldia**. It by no means follows from the fact that the parties agreed on a particular law to govern their contract that they also agreed that it should govern the question of whether they had made a contract at all. In other words, the question whether the parties have agreed on an alleged choice of law clause could arise independently of the question whether the parties had reached agreement on the contract itself. One should therefore ignore any alleged choice of law in the disputed contract and determine the question whether the parties had reached agreement by an objectively ascertained putative proper law i.e. the laws of the province (in the case of Cameroon) with which the contract would be most closely connected assuming that

¹¹⁰ The Canadian case of *Renfrew Mills*, *Op. cit.*, note 77, is proof that situations like that can occur in practice.

¹¹¹ [1967] 2 Q.B. 590 at 602-3.

¹¹² [1982] 2 LL.R. 351 C.A.

¹¹³ The issue itself was whether leave should be granted for service abroad under RSC Order 11-1 on the ground that the contract was governed by English Law.

it was made, as in the **Albeko case**.

Another difficulty with the putative proper law approach, even if ascertained objectively, is that it will be unjust to hold a party bound by the law of another province (a common law province, for instance) in circumstances in which he is not bound by the law of his own province (e.g. the civil law). For example, when by his own law, he can change his mind between posting and receipt of acceptance, but not by the common law. This difficulty has been recognised by the EEC Rome convention on the law applicable to contractual obligations.¹¹⁴

The difficulties of the putative proper law approach notwithstanding, it still remains the best solution to the problem of determining when a contract is made in conflict situations. It certainly will be useful in Cameroon and to avoid some of its difficulties, there should be some qualifications, possibly on similar lines to article 8 (2) of the Rome Convention.

(2). The Place of Contract Formation

It is important to determine the place of contract formation because of the problems of venue and the problems pertaining to the applicable law in matters of conflict of laws.

At common law, a contract is made at the place where the last act necessary for its formation is done. In matters of contracts by telephone, court decisions have established that the contract is made at the place where the recipient of the call is at the time he accepts the offer¹¹⁵.

French law is not settled on this issue. It is stated in general terms that the place where the contract is made is that place where the minds of the parties actually meet. Where the

¹¹⁴ To the normal rule that the putative proper law (even including an alleged choice of law by the parties) determines whether the parties reached agreement (articles 3(4) and 8), is added the following proviso of art. 8 (2):

"Nevertheless, a party may rely upon the law of the country in which he has habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."

¹¹⁵ *Entores Ltd v. Miles Far East Corporation* [1955] 3 WLR 48 (CA).

parties are face to face, one can easily understand this general statement but what if the parties are at different places?¹¹⁶ In this regard it is said that the place where the contract is formed depends on the moment it is concluded. This too is hardly a satisfactory answer if one bears in mind that there is not a clear cut answer to the question as to when a contract is formed in French law.¹¹⁷ However, since the majority of French decision seem to favour the reception theory when answering the question as to when a contract is formed, one may say it is admitted that the contract is formed at the place where the letter of acceptance is received. The *Cour de Cassation* has always maintained that the question is one of fact and therefore within the *pouvoir souverain* of the trial court.

In Cameroon, the question of place of contract formation does not raise any serious problems. It is also not of very major importance because jurisdiction is not necessarily determined by the place where the contract is made.¹¹⁸ This question only assumes importance in cases where the parties are *inter absentes*, such as in contracts by correspondence.

But in Cameroon, it is always very easy to determine where any given contract was formed. This is because the vast majority of contracts are negotiated and concluded *inter praesentis*. It is rare for a contract to be concluded entirely by correspondence. That contracts are almost always concluded *inter praesentes* can be explained by the fact that commercial life in Cameroon is not highly depersonalised. Also, the regularity of business connections (and correspondence) between different localities is not very much developed. People generally prefer to go about their affairs in a very local way. They will do business with the local carpenter, the local bank, the local bookseller, etc., and only in cases where the required service or goods is not available in their locality will they get involved with people from different places which may necessitate correspondence. Besides, the "super information highway" (e.g. telephone, telefax, telesales, e-mail) is not yet widely available in Cameroon.

¹¹⁶ This does not include contract by telephone. See Weill & Terre, para. 137.

¹¹⁷ See the respective theories discussed below above under "Time of Contract Formation".

¹¹⁸ See chapter 3 above.

CHAPTER SIX.

CONSIDERATION AND CAUSE.

An essential feature of both the English common law and French civil law is the rule that not every promise or agreement made will be enforced by the courts. If the basis of such a rule was dictated by commonsense,¹ the need for it was re-inforced by the emergence of the economic doctrine of laissez faire and autonomy of the will respectively as the basis of the law of contract. If these doctrines were applied unrestrictively, they would have ascribed legally binding effects to all agreements, even to the mere coincidence of the wills of the contracting parties. The consequence of this would have been a shift from a period of extreme formalism to one of extreme consensualism.

Both systems found it necessary, therefore, to evolve a test for actionability of agreement that will create legal obligations but they differ in the methods which they have adopted to distinguish between promises that are enforceable in law and those that are not.² The common law found this test in that "insular doctrine and unique phenomenon",³ the doctrine of *consideration*; according to which a promise not under seal must be supported by consideration to be enforceable. The civil law for its part evolved the doctrine of *cause*.

In this study, these doctrines shall be treated separately for the following reasons. Firstly, although the reasons for their introduction are broadly analogous,⁴ their

¹ Sutton, *Consideration Reconsidered*, 1974, p.1.

² Von Mehren, "*Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*" (1959) 72 Harv.L.R. 1078.

³ Sutton, *op.cit.*, note 1, p.1.

⁴ David, "*Cause et Consideration*" In: *Melanges Maury*, Vol. 2, 1960, p.113; Markensinis, "*Cause and Consideration: A Study in Parallel*" (1978) 37 C.L.J. 55.

origins are different and so too are their respective forms. Secondly, the doctrine of consideration applies only in the common law jurisdiction of Cameroon while the application of the doctrine of cause is limited only to the civil law jurisdiction.

1. CONSIDERATION

The twentieth century has witnessed several attacks⁵ on and some modifications of the doctrine of consideration in England and various common law jurisdictions, especially the U.S.A (where the doctrine has received its closest scrutiny and been subjected to perhaps its harshest criticism).⁶ There have even been calls for the abrogation of the doctrine.⁷

As a result of this twentieth century revolt on the practical functioning of the doctrine of consideration in other common law jurisdictions, it becomes vital for this study to attempt to assess its value and application in Cameroon and to consider whether the doctrine requires any changes or modifications. In short, to discover, "wherein it fits and wherein it is out of joint".⁸ I shall start with a brief discussion on the origin and definition.

⁵ Lord Wright, "*Ought the Doctrine of Consideration be Abolished*" (1936) 49 Harv.L.R. 1125; then see, the 6th Interim Report of the Law Reform Committee, Cmnd. 5449, 1937 and the ensuing literature it provoked such as: Hamson, "*The Reform of Consideration*" (1938) 54 L.Q.R 233; Mason, "*The Utility of Consideration - A Comparative View*" (1941) 41 Col.L.R. 825, and Chloros, "*The Doctrine of Consideration and the Reform of the Law Contract*" (1968) 17 I.C.L.Q. 137.

⁶ See for example the 1941 Symposium on Consideration, covered by (1941) 41 Col.L.R.

⁷ Chloros, *op. cit.*, note 5.

⁸ Llewelyn, "*On the Complexity of Consideration - A Foreword*" (1941) 41 Col.L.R. 777, 782.

(1). THE ORIGIN AND DEFINITION CONSIDERATION.

I do not here intend to recount the history of the origin of the doctrine. Suffice it to say that the origin of the doctrine of consideration is obscure and controversial. Holmes⁹ thought it arose from the *quid pro quo* of the action of debt. Fifoot¹⁰ found it in the bargain theory of agreements in English law and Holdsworth¹¹ has suggested that it arose from the tortious nature of the action of the assumpsit, the detriment being the damage resulting from the breach of the obligation. The disagreement as to its origin notwithstanding, the doctrine gained considerable judicial approval in the 17th and 18th Century. It was not until 1765 that Lord Mansfield began questioning its validity and operational scope.

His bold attempt in *Pillans v. Van Mierop*¹² to introduce writing in lieu of consideration and the failure of that attempt in *Rann v. Hughes*¹³ are already too well known to deserve any further treatment here. Undeterred by that failure, Lord Mansfield next chose to equate consideration to a moral obligation,¹⁴ an approach which, though accepted at the time was later to be forcefully rejected by Lord Denman in *Eastwood v. Kenyon*.¹⁵

Thus for over two centuries now, English law has accepted the position that an informal agreement not supported by consideration cannot be enforced by the court. This means that consideration was firmly part of English contract law at the time it was introduced in Cameroon and the common law courts in Cameroon have since

⁹ Holmes, Common Law, (1881), chapter 7.

¹⁰ Fifoot, History and Sources of the Common Law (1st ed., 1949), at 398.

¹¹ Holdsworth, The History of English Law, Vol.8 p.11.

¹² (1765) 3 Burr 1663.

¹³ (1778) 7 Term Rep. 350.

¹⁴ In *Hawkes v. Saunders* (1782) 1 Cowper 289.

¹⁵ (1840) 11 Ad.& El. 438.

applied the doctrine very rigorously.

Like its origin, the precise definition of consideration, has provoked some controversy and uncertainty.¹⁶ This may perhaps be due to the complex and subtle way that the doctrine developed in England. Several divergent definitions have been advanced.¹⁷ But the classic or traditional definition, was propounded by Lush J. in **Currie v. Misa**:¹⁸

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

This identification of consideration in terms of benefit and detriment has been seriously questioned and is often considered as unsatisfactory.¹⁹

An alternative definition, advanced by Pollock:²⁰

"An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable",

was adopted by the House of Lords in *Dunlop Pneumatic Tyre v. Selfridge & Co. Ltd*²¹ and by the English Law Revision Committee, 1937 in their report on the

¹⁶ See, Lord Wright, *op. cit.* note 5, 1226.

¹⁷ In Lindgren, Carter and Harland, **Contract Law in Australia**, 1986, p.80, 10 definitions are reproduced.

¹⁸ (1875) L.R 10 Ex. 153.

¹⁹ Treitel, **The Law of Contract**, 1991, pp. 65-66; Fifoot *op.cit.*, note 10, p.406 referred to the problems of benefit and detriment as follows: "The antithesis 'detriment and benefit', which Victorian judges repeated as a confident formula, was at yet no more than a convenient phrase, and the principle which it reflected still lay open to the impression of new minds and new necessities." Also, Cheshire, Fifoot & Furmston: **Law of Contract**, 1991, p. 73.

²⁰ Pollock, **Principles of Contract** (13th ed.), p.133.

²¹ [1915] A.C. 847, 855.

doctrine of consideration.²²

Definitions such as Pollock's emphasize the element of bargain and are indeed, sometimes referred to as the "bargain theory of consideration",²³ clearly indicating that there must be some link between the forbearance or detriment suffered or undertaken by one party and the promise by the other. This link is a request, or in the words of Pollock, the price.

Cameroonian common law courts so far, have not shown any consciousness of a distinction between the various definitions or any tendency to accept any of them outright. However, while there have been instances in which the courts have sought to establish the presence of consideration in terms of benefit or detriment, on the whole, they have shown a greater inclination towards the bargain theory.

Without undermining the definition of a legal concept as an aid to its understanding, I shall dismiss the failure or the reluctance of Cameroonian courts to adopt any one definition as of no real significance to the present exercise. After all, it has been said that "contract in any legal system may be based on the principle either of promise or of bargain, and the one has no innate superiority over the other."²⁴

What is important here, is the fact that the doctrine is firmly established in that part of Cameroon where the common law operates. The Cameroonian courts have never set out to define it. Rather, they have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced. It is to such concerns that I now turn.

²² Cmd. 5449, s.17 p.12; see also Lord Wright, *op.cit.*, note 5, p.1227.

²³ See for example, **The Restatement of Contracts**, 2d, s.75; Sutton, "*Promises and Consideration*" In: Finn (ed): **Essays on Contract**, 1987, p.35.

²⁴ Fifoot, *op.cit.*, note 10, p.398.

(2). JUDICIAL PRACTICE IN CAMEROON.

It follows from the the bargain theory of consideration that consideration must not be past, that the price paid must be paid by the promisee, that what is paid is not worthless but must be of some value in the eye of the law and that any act done by the promisee on the faith of the promise being kept will not be consideration unless it is expressly or impliedly requested by the promisor as the return for his promise. I shall now briefly consider how the Cameroonian courts have applied these cardinal rules of consideration.

(a). An Informal Agreement Must be Supported by Consideration

Not very often is consideration, or rather the lack of it, a main issue before the courts. Most cases arise out of simple contracts where the presence of consideration is all too obvious and is therefore not disputed. But where the courts find that it is absent, they certainly will refuse to enforce the agreement.

Thus in **John Fonbah v. Emmanuel Ojechi**,²⁵ the plaintiff bought a gallon of engine oil from the defendant's petrol garage. The defendant's staff helped the plaintiff to put the oil into his car engine. When the car later developed serious mechanical problems, the plaintiff alleged that it was caused by the defendant's staff who had negligently failed to close the engine properly after filling it with oil and he sued for breach of contract.

The defendant argued that neither he nor his staff was under any contract to put the oil into appellant's engine and that the action of his staff amounted to nothing more than a gratuitous service to the plaintiff. The only contract he had with the plaintiff, he admitted, was the contract of sale. It was held by the Buea Court of Appeal, affirming the decision of the the trial judge, that no contract existed which required defendant to put the oil into the plaintiff's engine since there was no

²⁵ Civ.Ap. No.CASWP/39/78 (Buea, unreported).

consideration for such service.²⁶

(b). Past Consideration

The general rule at common law is that past consideration (where an act is done well before the promise is made)²⁷ does not amount to valid consideration. A typical example of past consideration is where the consideration is motivated by gratitude or sentiment, and does not necessarily form part of the contract. Thus where a contract has been concluded, a subsequent promise which is independent of the contract is a past consideration.²⁸

There are no clear Cameroonian examples of actual decisions where consideration has been declared to be past but there have been attempts to invoke the rule. In **David Tala Ndi v. Daniel Chamba Wanji**²⁹ the appellant, a timber dealer agreed to hire the respondent's engine-saw for 30 days at a price of 30.000 francs or iroko timber worth that amount. The agreement was signed between the respondent and a certain Raphael on behalf of, and with the authority of, the appellant. This agreement was later read out to the appellant who then counter-signed it before the saw was handed over to him. In an action by the respondent for breach of contract (appellant had failed to pay the hire charges and to return the saw), it was argued rather misguidedly on behalf of the appellant that any consideration he had furnished was past because he had signed the agreement after it had already been concluded between his agent, Raphael, and the respondent.

The Bamenda Appeal Court, upholding the high court, rejected such a baseless

²⁶ One would have thought that any chance of success that the plaintiff had who have been better framed in tort, precisely on negligence, assuming that he was owed a duty of care.

²⁷ *Eastwood v. Kenyon* (1840) 11 Ad. and E.438.

²⁸ *Roscorla v. Thomas* (1842) 3 Q.B. 234.

²⁹ BCA/28/89 (Bamenda, 5/7/91, unreported).

argument, pointing out quite correctly that the doctrine of past consideration simply did not arise. This was substantially one transaction, the fact that the appellant signed the agreement after the respondent had done so was irrelevant.

It must be said, from the authority of English decisions, that the courts are not irrevocably committed to carry the principle of past consideration to its logical conclusion as that is likely to lead to strange results in some situations. The rule has in justifiable situations been relaxed and applied with some measure of commonsense. The general guidelines are that an act done before a promise was made can amount to consideration for it if three conditions are satisfied: the act must have been done at the request of the promisor; there must have been an understanding that payment would be made; and payment must have been legally recoverable had it been made in advance.³⁰

Although the decision in *Bassum v. Youya*³¹ cannot be considered as strong authority for the principle of past consideration, it nevertheless indicates that Cameroonian courts would be prepared to give effect to past consideration where the above mentioned conditions are present. In that case the defendant had promised to pay the plaintiff a certain undefined sum after an undefined period of time if the plaintiff would serve in his business. The plaintiff worked for the defendant for a eight years and in an action for the promised sum, the appeal court, reversing the high court, held that the plaintiff was entitled to recover.

Even though the court did not discuss the three mentioned conditions, it is submitted that had the defendant raised the the defence of past consideration, the court would still have arrived at the same conclusion since the plaintiff had clearly acted on the defendant's request with the understanding that he would be paid a sum, which sum was legally recoverable.

The real exceptions to the rule that consideration must not be past are statutory.

³⁰ See *Lampleigh v. Brathwait* (1615) Hobart.105 and *Re Casey's Patent* (1892) 1 Ch. 104.

³¹ BCA/48/84 (Bameda, 24.7.1985, unreported).

The first one is to be found in the **Bills of Exchange Act, 1882, s.27(1)(b)** to the effect that an antecedent debt or liability is good consideration for a bill of exchange. The other one is contained in the **Limitation Act, 1980, s.27(5)**: where a debtor in a writing signed by him acknowledges a debt, it shall be deemed to have accrued on and not before that date of acknowledgement. It is significant to point out here that only the former act applies in Cameroon, it being of pre-1900 birth. Therefore, there is only one real (statutory) exception to the rule on past consideration in Cameroon.

(c). Consideration Must Move from the Promisee

It is a cardinal principle of the common law of contract that consideration must move from the promisee. Expanded, this means that only the person who has furnished consideration in a contract can bring an action to enforce a promise given by the defendant in that contract. In other words, the plaintiff must be in a position to show that he had given value for the defendant's. This is an age old rule³² that has been re-emphasised in the cases of *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridges & Co. Ltd*³³ and *Vandepitte v. Preferred Accident Insurance Corporation of New York*.³⁴

This rule was applied in the Cameroonian case of *Ronate Tapong v. Joshua Mobitt*.³⁵ I shall defer any discussion on this case until when I consider consideration and family arrangements in section 5 below. The rule that consideration must move from the promisee is rightly considered as one of the dark spots of the doctrine and later I shall argue and show how a strict adherence to it, especially in non-commercial cases, may sometimes lead to strange results.

³² See, *Price v. Easton* (1833) 4 B. & Ad. 433; *Thomas v. Thomas* (1842) 2 Q.B. 851,859; *Tweddle v. Atkinson* (1861) 1 B. & S. 393,398,399.

³³ [1915] A.C. 847.

³⁴ [1933] A.C.70.

³⁵ BCA/31/74. (Bamenda, unreported).

(d). Adequacy and Sufficiency of Consideration.

The basic rule is that consideration need not be adequate but must have some value in the eye of the law.³⁶ This means that in general, the court will make no enquiry as to whether adequate value has been given or whether there is a fair equivalence of value.

This is well illustrated in the Cameroonian case of *Francis Mokoto Ngute v. Paul Nwatu*.³⁷ By written agreement dated 14/9/1966, Emmanuel Ngute, the deceased brother of the appellant, leased out a piece of farmland to the respondent for a period of 40 years. The only consideration was what was described as 5.700 francs worth of kolanuts plus all the crops on the farmland at the expiry of the 40 years. As it turned out, Emmanuel died well before the expiry of the 40 years and his brother, Francis (the appellant) brought this action against the respondent for conversion and for an order that the farmland be transferred to him.

To support his case, the appellant argued that the length of the lease was unreasonably long and that what had been given in return was very small. It was held in the first place that the appellant was not a party to the contract and hence had no *locus standi* to complain. On the question of consideration, the court conceded that it looked derisory. Monono J even expressed some sympathy on behalf of the court when he said, "40 years is a long time and we cannot help wondering how Emmanuel knew he would live to enjoy his consideration". But sympathy was all that the court was prepared to offer as it did not feel compelled to "equalise" the obligations or interfere with the contract. The consideration, however token or nominal, was valid consideration.

However, while the courts will not attempt to equalise a bargain made by the parties, in exceptional cases an extremely conspicuous inequality may be used as

³⁶ *Thomas v. Thomas* (1842) 2 Q.B. 851,859; *Carlill v. Carbolic Smoke Ball* (1893) 1 Q.B. 256; *Chappell & Co. Ltd. v. Nestle Co. Ltd.* [1960] A.C. 87.

³⁷ CASWP/21/86 (Buea, unreported).

evidence to suggest that the contract had been brought about by fraud, duress, mistake or misrepresentation or just possibly that there was never any intention to create legal relations. This certainly is the position in England³⁸ and it can be said, that had there been any evidence of some vitiating factor in the Cameroonian case just considered above, the court would have refused to sanction the contract.

Although the law does not inquire into the adequacy of consideration, it is bound to consider whether consideration is sufficient. It follows that where on proper examination a purported consideration amounts to a mere performance of an existing obligation, the court will refuse to enforce such an obligation. Sufficiency of consideration must therefore be clearly distinguished from adequacy of consideration. I shall briefly consider situations in which legal arguments have been put forward in an attempt to determine whether the court will accept that the promise by one party has been sufficiently bought or paid for by consideration that has a legal value.

It is in the area of pre-existing duties that this debate is at its strongest.³⁹ The question is whether a person can provide sufficient consideration by performing a pre-existing legal duty. The answer to this question depends on how the duty arose.

The general rule is that a promise to perform a duty imposed by law does not amount to consideration for a promise given in return. But where a person does an act which is well in excess of that imposed by the law on him, that will amount to

³⁸ For example, *Lloyds Bank v. Bundy* [1975] Q.B. 326, 337, where there was a presumption of undue influence. It should be noted that this was said to be an exceptional case that turned on very special facts. Normally the presumption of undue influence does not apply between banker and customer (*NatWest Bank v. Morgan* [1985] A.C. 686).

³⁹ Davis, "Promises to Perform an Existing Duty" (1938) 6 C.L.J. 202; Goodhart, "Performance of an Existing Duty as Consideration" (1956) 72 L.Q.R. 490; Reynolds and Treitel, "Consideration for the Modification of Contracts" (1965) 7 Malaya L.R. 1; Aivazian, Trebilock & Penny, "The Law of Contract Formations: The Uncertain Quest for a Bench Mark of Enforceability" (1984) 22 Osgoode Hall L.J. 173.

consideration.⁴⁰

Where the duty is imposed by contract with a third party, it is generally agreed that the performance of that duty can constitute consideration. *Shadwell v. Shadwell*⁴¹ is authority for that view, but in the Cameroonian case of *Ronate Tapong v. Joshua Mobitt*⁴² the Bamenda Court of Appeal refused to accept or adopt such a view. The respondent paid some money as dowry to the appellant on the understanding and agreement of both that the appellant would marry the respondent's junior brother. The appellant eventually backed out of the arrangement and in an action for a refund of the money she had received, the court of appeal, reversing the high court, held that the respondent could not succeed.

I have already criticised the decision of this case on different grounds⁴³ and I shall do so again with regard to the court's interpretation of the doctrine of consideration below.⁴⁴ The decision, however, should not be taken as conclusive proof that Cameroonian courts would never consider the performance of a duty to a third party as consideration since the court did not think that it was addressing that issue specifically. I have only cited this case to suggest that the courts have had an opportunity to do so, yet failed to take it.

It was once thought that a promise owed to a third party, as distinct from actual performance could not amount to consideration but it is now settled in England that a promise to perform to a third party, no less than its actual performance, would

⁴⁰ *Ward v. Byham* [1956] 1 W.L.R. 496; *Glasbrook Bros. Ltd. v. Glamorgan C.C.* [1925] A.C. 270; there is no Cameroonian case on this point.

⁴¹ (1860) 9 C.B (N.S) 159; *Scotson v. Pegg* (1861) 6 H. & N. 295.

⁴² BCA/31/74 (Bamenda, unreported).

⁴³ In chapter 2, I argued that this case should have been dealt with exclusively according to the native laws and custom of the parties as this was what the parties clearly contemplated when they entered into the agreement.

⁴⁴ See section 5 on Consideration and Family Arrangements (Non-Commercial Contracts).

constitute consideration.⁴⁵ It is hoped Cameroonian courts will do the same if and when the matter comes before them.

Finally, where the promisee is under a duty imposed by contract with the promisor, the general rule, as enshrined in *Stilk v. Myrick*⁴⁶ is that any promise by him to perform that same duty does not amount to consideration. There have been some recent decisions, notably *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*,⁴⁷ which cast doubts on the age old authority of *Stilk v. Myrick* though not overruling it as such. The traditional position is still followed in Cameroon as *Lucy Effiom v. Mafcoop* (infra) demonstrates. As this case is given a detail consideration in the next section, there is no need to do so here.

So far, and notwithstanding the fact that there are few cases which deal with the theme of consideration, I have attempted to establish that the doctrine of consideration is fully entrenched in the contract law of Anglophone Cameroon. I shall next pass on to an examination of some areas⁴⁸ where a stringent application of the doctrine of consideration, as the courts are inclined to doing, may lead to practical problems and illogical results. These include the modification of contracts, irrevocable offers, and family or non-commercial arrangements.

(3). CONSIDERATION AND THE MODIFICATION OF EXISTING CONTRACTS.

Traditionally, the requirement of consideration has been insisted on, not only for the normal formation of contracts, but also for the modification of existing contracts. The principle here is that the promise or performance of an action which one is

⁴⁵ *Pao On v. Lau Yiu Long* [1980] A.C. 614.

⁴⁶ (1809) Camp. 317.

⁴⁷ [1991] 1 Q.B. 1.

⁴⁸ These are discussed in Llewellyn, "What Price Contract? An Essay in Perspective" (1931) 40 Yale L.J. 741.

already obliged to do under a contract with the promisee cannot be good consideration for a new promise. The case that is regarded as the foundation of this rule is the old one *Stilk v. Myrick*.

While some have sought to explain this case on the basis of public policy considerations relating to the impropriety of the pressure placed on the captain⁴⁹ it has long been accepted that the better explanation is that of lack of consideration;⁵⁰ that is, that the promise by the captain to share the wages of deserting seamen between the rest of the crew was unenforceable, being unsupported by fresh consideration.

Although local judicial authority on this aspect is rather thin, there is some reason to believe that Cameroonian courts will follow the traditional rule as enunciated in *Stilk v. Myrick*, at least on the strength of the decision in *Lucy Effiom v. Mafcoop*.⁵¹ The plaintiff contracted to build a produce store for the defendants, the local co-operative. The agreed price was four million francs. On commencing work, the plaintiff found out that the execution of the contract would be far more onerous than expected. The site was in a valley, thus making excavation very difficult. To make matters worse, there was neither water, gravel, nor stones in that area. It was clear, therefore, that the plaintiff would have to incur heavy extra costs. The plaintiff drew this to the attention of the defendants and the resident rural engineer, who in his

⁴⁹ This is not entirely without support: in *Harris v. Watson* (1791) Peake 102, the ship was in danger when the captain offered the seamen 5 guineas each for exerting themselves to save the ship. It was held they could not recover on the ground that it would be against public policy to allow such claims by sailors who might, in emergency, force a captain to make extravagant promises.

Also, one report of *Stilk v. Myrick* at (1809) 6 Esp. 129 does not mention consideration at all and states that the principle of public policy in the *Harris* case was recognised as a just and proper policy.

⁵⁰ Serious doubts have been cast on Espinasse's report that explains the decision on public policy grounds. See, Percy's review of *Studies in Contract Law*, Reiter & Swan, eds., 1980, in (1981) 59 Can. Bar Rev. 853, 857, 858; see also Gilmore, *Death of Contract*, pp.23-28 for the contradictions in the various reports.

⁵¹ HCM/2/86.

capacity as the government engineer, was official supervisor of all defendants' building projects. Her demand for an extra 6 million francs was cut down to an extra 4 million francs on the advice of the supervising engineer and with the apparent acceptance of the defendants.

The plaintiff duly completed the structure and was paid 4 million francs (the original contract price) plus another 1 million francs which the defendants submitted was all she was entitled to for her extra costs. The plaintiff claimed that she was due an extra 4 million francs and sued for the residue. It was held that the plaintiff could not recover on the ground that there was no *consensus ad idem* as to the additional payment of 4 million francs. But nothing was said of the extra 1 million francs that the defendants actually paid, i.e. the court did not explain why it thought it need have been paid at all by the defendants.

The judge cited no authorities in his judgement, yet had he felt the need to buttress his decision with authority, he might have found some comfort in *Stilk v. Myrick*, in which case he would have had to explain his decision in terms of lack of fresh consideration rather than the questionable lack of *consensus ad idem* analysis he employed. This is questionable because it was not found as a fact that there was no consensus regarding the extra payment. Either way, however, the result would be the same - the plaintiff would not succeed.

Strictly speaking, the *Lucy Effiom* decision may be good law in the sense of traditional common law principles since the outcome is in line with the *Stilk v. Myrick* rule but the question must be asked whether such an outcome is desirable and fair. In my opinion the outcome is not fair, especially for the social and economic conditions of Cameroon at present. Even though the court did not explain its decision in terms on consideration, this case remains very pertinent to the subject of contract modification and I intend to use it to argue that the time has come for a shift from the traditional position to a more flexible and commercially friendly one.

Arguably, there is sufficient justification for caution when a court is asked to enforce a promise that modifies an existing contract, consideration apart. There are two possible reasons why a promise modifying an existing promise or contract might

be unenforceable. The first is that the new promise might be made without sufficient deliberation by the promisor⁵² and the second is that there may be duress or more broadly, some reason for regarding enforcement of the new promise as objectionable.

On the first point, it must be said that while the presence of consideration may be evidence of sufficient deliberateness, it is not the only test of deliberateness.⁵³ Business and commercial arrangements often present a wide range of factors all of which may point to, or justify enforcement.⁵⁴ In other words, they may be other reasons for enforcement, the absence of consideration notwithstanding. The concern that one might have that the agreement not be carelessly made is expended once it is clear that a contract (such as to build a house as in the *Lucy Effiom* case) has been made. Once parties are already in a contractual arrangement it should be possible to presume that any modification of the arrangement is made with the kind of care that would preclude any argument that the parties had no intention to alter their legal relationship. It is hard to understand the court's finding that there was no *consensus ad idem* on the alleged promise by the defendant to pay for the extra costs in the *Lucy Effiom* case, as that implies that the plaintiff knowingly incurred costs equal to the contract price without the consent, express or implied by the defendant. Certainly, if the plaintiff had been expressly told that she was not to be compensated for such substantial extra costs, she would surely have preferred to refuse to perform and pay damages, which in any case would not have been as much as the extra costs she incurred in performing. This is only good economic sense.⁵⁵

⁵² Fuller, "*Consideration and Form*" (1941) 41 Col. L.R. 799.

⁵³ This point has been cogently argued by Swan, "*Consideration*" In: Reiter and Swan, eds., *Studies in Contract Law*, 1980 p.29; see also, Lord Wright, *op. cit.*, note 5, 1229.

⁵⁴ In the *Lucy Effiom* case for instance, the unchallenged facts of the increased cost plus the costs and delays in hiring a new contractor may be considered good reasons for enforcement.

⁵⁵ For an economic analysis of the law relating to contractual modifications, see Halson, "*Opportunism, Economic Duress and Contract Modifications*" (1991) 107 L.Q.R., 649; Aivazian, Trebilock, and Penny, *Op. cit.*, note 39, 173.

The second reason that might justify a refusal to enforce the promise could be that there was duress or unconscionable conduct on the part of the plaintiff. The presence of economic duress, like fraud, might if proven, make any contract voidable.⁵⁶ It is bad social and economic policy to enable promisors to break or threaten to break contracts in order to secure acts or promises additional to those which the other contracting party is under an obligation to perform. Here again it is questionable whether consideration is necessarily the doctrine best suited for preventing economic duress or blackmail. If a promise by one party is found to have been made as a result of unconscionable conduct or illegitimate pressure by the other party, that promise should not be enforced, whether or not there is consideration. Yet, an inference that can be drawn from the judgement of Lord Ellenborough in *Stilk v. Myrick* is that, had the seamen had the foresight to offer the captain anything, however token for his promise, that promise would have been enforceable, and it would not have mattered how unconscionable they were by their conduct.

The irony here is that the mere presence of consideration will permit the enforcement of modificatory agreements which ought not to be enforced for reasons of public policy while on the other hand the absence of consideration will bar the enforcement of a modificatory agreement, which is very necessary for commercial and practical reasons. What this discloses, therefore, is that consideration is not always the most satisfactory tool for deciding what promises are going to be or should be enforced by the courts.

It is heartening then to note that the courts, while adhering closely to the *Stilk v. Myrick* rule, have not been totally insensitive to the problems involved. In order to curb some of the problems raised by the rules that a variation of a contract (either increasing or reducing one party's obligation) must be supported by consideration, they have developed one useful exception in the doctrine of equitable or promissory

⁵⁶ Palmer and Catpole, "*Industrial Conflict, Breach of Contract and Duress*" (1985) 48 M.L.R. 102, and particularly the case of *B. & S. Contracts and Design Ltd. v. Victor Green Publications Ltd* [1984] 1. C.R. 419; Fleming, "*Contract- Economic Duress - Consideration*" (1989) C.L.J. 363 in which is discussed *Atlas Express Ltd. v. Kafco (Importers and Distributors) Ltd.* [1989] 1 All E.R. 641.

estoppel while creating other limitations and exceptions to the rule in *Foakes v. Beer*.⁵⁷ But the most serious challenge to the validity of the *Stilk v. Myrick* principle is to be found in the recent decision of *Williams v. Rofey*.⁵⁸ It will be of some interest to consider these limitations and find out how useful, if at all, they have been or may be to Cameroonian courts.

(a). Equitable or Promissory Estoppel

This doctrine has gone a long way to mitigate the rigours of the classical rule that a promise made without consideration is unenforceable. It was established by Lord Cairns in the leading case of *Hughes v. Metropolitan Railway*,⁵⁹ and re-incarnated by Denning J. in *Central London Property Trust Ltd. v. High Trees House Ltd.*⁶⁰

Although this doctrine gives certain effect to promises without consideration, there are some important differences between the legal effect of a promise made under this doctrine and the effects of a variation which is contractually binding because it is supported by consideration. The first one is that while a variation alters the parties' position once and for all, the effect of promissory estoppel on the other hand, is merely to suspend rights.⁶¹ Secondly, the principle of estoppel only applies where it would be 'inequitable' for the promisor to go back on his promise without due notice.

The doctrine of equitable estoppel, welcomed as it may have been, is not without its difficulty. It can only be used as a defence to an action or as a subsidiary in

⁵⁷ (1884) 9 Ap.Cas. 605.

⁵⁸ [1990] 1 A.E.R. 512.

⁵⁹ (1877) 2 A.C. 439, 448.

⁶⁰ [1947] K.B. 130.

⁶¹ *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 2 A.E.R. 657.

support of a major cause of action⁶² but not as a new cause of action, or in the oft-cited dictum of Birkett L.J. in *Combe v. Combe*,⁶³ "as a shield but not a sword".

The doctrine of equitable estoppel has been given serious consideration in Cameroon in a trilogy of cases, all involving the same defendant, Brasseries du Cameroun. The first was *John Mokake Elali v. Brasseries du Cameroun*.⁶⁴ The defendant brewery which had been the main supplier of drinks to the plaintiff's off-licence bar for a period of about 4 years, discontinued the supply as a result of plaintiff's allegation that the defendant had supplied him with unwholesome beer. The plaintiff brought an action for breach of contract, claiming that the defendant, having promised to supply him with drinks at his premises and having actually done so for four years should be estopped from denying that promise since it would be inequitable to do so in the circumstances.

The defendants for their part argued, *inter alia*,⁶⁵ that they were under no contract to supply drinks to the plaintiff at his off licence bar, as the plaintiff had furnished no consideration for such an arrangement. The Buea High Court dismissed that argument and found for the plaintiff. Njamnsi J. sought to explain his decision thus:

"Having so agreed or promised and acted upon the agreement for a period of over 4 years and thereby leading the plaintiff to rely and act upon the agreement, the ~~defendant~~ cannot therefore go back on his promise...to the detriment of the plaintiff without being liable to the plaintiff in damages. In coming to this conclusion..., I find legal solace in the opinion of Lord Justice Denning in the *Central London Property Trust Ltd. v. High Trees House Ltd.*)."

That decision was reversed on appeal on the grounds that for the doctrine to apply,

⁶² For an illustration of its use as a subsidiary ground, see *Robertson v. Ministry of Pensions* (1949) 1 K.B 227; *Foster v. Robinson* (1951) 1 K.B 149, 152.

⁶³ [1951] 1 A.E.R 767.

⁶⁴ HCSW/35/75 (Buea, 6.1.1978, unreported).

⁶⁵ The defendants also argued that their actions amounted to no more than an invitation to treat, see chapter 5, note 33.

there must have been an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made. Since the Court of Appeal agreed with the defendants' contention that no contract existed because of want of consideration, they found little difficulty in rejecting the application of the doctrine.

It is difficult to see how the judgement of the Court of Appeal can be correct. The court failed to take note of the fact that even if the promise to supply drinks was made without consideration, such was the nature of the promise that it reasonably induced action on the faith of it or reliance upon it. The court should simply have determined whether that reliance had resulted in loss to the plaintiff/respondent, and if yes, then allow him to recover. *Anglia Television Ltd. v. Reed*⁶⁶ is authority for the proposition that even expenditure incurred before a contract may be recoverable. And in *Lloyd v. Stanbury*⁶⁷ it was held that pre-contract expenditure may also be recoverable if it was incurred in reliance on an *agreement* before that agreement had become a legally binding *contract*. The decision of the Buea High Court, for me is clearly the more just one.

The doctrine has however been successfully invoked in *Brasseries du Cameroun v. Achuo Daniel*.⁶⁸ Between 1961 to 1973, Daniel Achuo bought drinks regularly from Brasseries du Cameroun to sell to the public. In 1973 he was made the sole distributor for the North West Province and advised by Brasseries du Cameroun to buy vehicles and let them on hire to Brasseries du Cameroun. He obtained several vehicles on hire purchase which he used for distribution and for many years everything moved on smoothly. Then in 1989, the company stopped supplying drinks to him for distribution, on the pretext that he owed them money. Mr Achuo did not contest the debt but explained to Brasseries du Cameroun that he could only pay it if he remained in business with them. Because of their decision to discontinue supplying to him, his trucks had become idle with the consequence that he was

⁶⁶ [1972] 1 Q.B. 60.

⁶⁷ [1971] 1 W.L.R. 535.

⁶⁸ BCA/24/91 (Bamenda, 19/3/1992, unreported).

incapable of meeting the hire purchase payments. His appeal fell on deaf ears whereupon he brought an action for breach of contract. The trial judge found for him.

Brasseries du Cameroun appealed, repeating their argument that no contract ever existed between them and the plaintiff and claiming that their relationship amounted to no more than isolated instances of carriage of their products by the plaintiff. This argument did not find favour in the appeal court which confirmed the decision of the trial judge. It was held that considering the length of the parties' relationship, plus the fact that the respondent had relied on it, it would be inequitable in the circumstances for the appellant to discontinue supplies without having given sufficient notice to the respondent.

In the third case, *Ambe John v. Brasseries du Cameroun*,⁶⁹ the plaintiff who ran an off-license bar, was a customer of the defendants for about 15 years before becoming a wholesaler of their products. In order to qualify as such, he was told he would need vehicles as well as adequate storage facilities. He complied with these requirements to the satisfaction and approval of the local manager of Brasseries du Cameroun. He then acted as their wholesaler for a couple of years, when in a bitter twist, very reminiscent to the *Mokake v. Brasseries case*, he complained that he had found some foreign and strange substances in some of the defendants' products. The defendant in their characteristic high-handedness, refused to supply any more drinks to the plaintiff. He sued for breach of contract.

Not surprisingly, the defendants contended again that they were under no contract to sell or supply drinks to the plaintiff. The judge rejected that argument. He held that a contract existed and that the defendants, having conducted themselves in such a way as to lead the plaintiff to believe he was entitled to be sold or supplied with drinks, must be estopped from so denying. In other words, it was inequitable for the defendants to back out unilaterally of the arrangement without good reason or sufficient notice to the plaintiff.

⁶⁹ HCB/51/90 (Bamenda, 6/4/92, unreported).

(b). Consideration and Part Payment of an Existing Debt.

In the celebrated *Pinnel's case*,⁷⁰ the rule was laid down that a promise to forego part of a debt or any liability is not enforceable unless it is supported by consideration. That is to say payment of a lesser sum is no satisfaction of the debt. This doctrine was repeated and given its modern form by the House of Lords in *Foakes v. Beer*,⁷¹ and was discussed in the Cameroonian case of *Denis Ndikum v. North West Development Authority (MIDENO)*.⁷² The defendants placed an order for stationery with the plaintiff, the understanding being that payment would be made upon delivery. Strangely, no price was agreed at this stage. The plaintiff delivered the goods and the defendants accepted delivery, signing the delivery note and invoice. The plaintiff presented a bill for 2.5 million francs but the defendants were only prepared to pay 700.000 francs.

In an action by the plaintiff for the full amount, it was held that by accepting delivery, the defendants had by their conduct, led the plaintiff to believe that they would meet his asking price and were therefore bound to pay. On the question of consideration, the court cited with approval the Nigerian case of *T.D.Amao v. A.G. Ajibike & 3 others*⁷³ in which Taylor J. had reproduced Lord Coke's speech in the *Pinnel's case* to the effect that in the absence of some new obligation or thing, a lesser sum cannot be satisfaction to the plaintiff for a greater one. It must be said that this is not a classic part payment case as the plaintiff never accepted the part payment at all. Yet, the case nevertheless suggests that Cameroonian courts are aware of the doctrine and its implications.

The rule in *Pinnel's case* must also go down as one of the anomalies of the doctrine of consideration. It is ironic that the law refuses to accept as a good contract

⁷⁰ (1602) 5 Co. Rep. 117a.

⁷¹ (1884) 9 A.C. 605.

⁷² HCB/6/85 (Bamenda, 10/6/1987, unreported).

⁷³ [1955-56] W.R.N.L.R.

an agreement whereby a creditor undertakes to release his debtor from the original debt in return for payment of at least some of which was owed which at least has the merit of assuring the creditor that the debt was not altogether lost whereas the law treats as a valid agreement one under which the creditor discharges his debtor from liability in return for something of little or no value, for example, a peppercorn.⁷⁴

In order to bring the law more or less in harmony with commercial needs, several exceptions and qualifications to the general rule in *Pinnel's case* and *Foakes v. Beer* have been created. Since these exceptions⁷⁵ have not been tested in the Cameroonian courts, they will not be considered here.

It is clear that the purpose of the rule in *Foakes v. Beer* was to protect the creditor from the debtor's undue pressure but it is once again questionable whether such a function is best performed by the doctrine of consideration, even allowing for the many qualifications to the rule in *Foakes v. Beer*. I share in the view that that function can be better performed by the expanding concept of duress rather than by the doctrine of consideration.

The doctrine of equitable estoppel and the exceptions and qualifications to the rule in *Foakes v. Beer* have no doubt watered down the rigours of the rule that a promise to modify an existing promise is not enforceable without a corresponding consideration. But despite these efforts to make the doctrine in *Stilk v. Myrick* less relevant, the doctrine has still managed to maintain life and effectiveness. That said, it will be interesting to see how the doctrine will survive the effects of the recent decision in *Williams v. Rofey Bros. & Nicholls (Contractors) Ltd*⁷⁶ and how that

⁷⁴ On peppercorns, see Lord Sommerville in *Chappel & Co. v. Nestle Co.* [1961] A.C. 87 at 114 H.L.

⁷⁵ They include, for instance, the introduction of some new element, however trivial (this was recognised in the *Pinnel's case* itself); the rule that payment from a third party can constitute a full settlement of the debt; the doctrine of promissory estoppel; and arrangements between a debtor and his various creditors, that is composition. See generally, Atiyah, *Introduction to Contract Law*, p.43; Treitel, 8th. ed., pp.116-124; and Chesire, Fifoot & Furmston, p.95.

⁷⁶ [1990] 1 A.E.R. 512.

will be considered in Cameroon.

(c). The Effect of *Williams v. Rofey* on the rule in *Stilk v. Myrick*.

In *Williams v. Rofey* the defendants were the main contractor to refurbish a block of council flats. They sub-contracted the carpentry work to the plaintiff. Partway through the contract, the plaintiff got into financial difficulties, at least in part because the contract price for the carpentry work was too low. The defendants, worried that the plaintiff would not complete the work on time, or would stop work altogether (there was a penalty clause in the main contract under which the defendants would have been liable in the event of late completion), promised a further £10,300 to the agreed price of £20,000 at a rate of £575 per flat completed. On this basis the plaintiff continued work and completed a further eight flats. Then, suspecting that the defendants would default in their promise of additional payments, the plaintiff ceased work and subsequently sued for the additional sums in relation to the eight completed flats. The county court judge found for the plaintiff and the defendant appealed.

The main issue on appeal was whether there was any consideration for the promise to make the additional payments. The defendants argued that there was none as the plaintiff were already bound by an existing contract to do the job. But Glidewell L.J. managed to find consideration which he outlined as follows: the assurance that the plaintiff would continue working and not halt work in breach of contract, the avoidance of the penalty clause operating, and the avoidance of the trouble and expense of engaging different carpenters to complete the work. In the view of the court of appeal, these benefits were enough to support the defendants' promise to make additional payments. In reaching this conclusion, all members of the court were at pains to stress that they were not suggesting that the principle in *Stilk v. Myrick* was wrong, but that the present case could be distinguished from it.

It is difficult however to distinguish these cases since similar benefits to those

identified above could be said to have been present in *Stilk v. Myrick*.⁷⁷ The only reason for distinguishing *Stilk v. Myrick* seems to be related to the absence of any fraud or duress⁷⁸ but as earlier pointed out, the accepted explanation for the decision in *Stilk v. Myrick* (or as it has been understood in modern times), is the lack of consideration,⁷⁹ despite attempts by some to explain it on the grounds of duress.

Glidewell L.J. also placed reliance on the statements of Lord Scarman in *Pao On v. Lau Yiu*⁸⁰ to the effect that "if there is coercion, there can be no reason for avoiding a contract where there is shown to be a real consideration which is otherwise legal." But in that case, Lord Scarman was discussing an existing obligation to a third party as sufficient consideration and English law has always regarded this differently.⁸¹ Glidewell L.J. recognises this but dismisses it as insignificant and went on to declare that a promise of an additional payment, in the absence of any economic duress or fraud is legally binding because the benefit that the promisor derives as a result of his promise, is capable of being consideration.

The court is also dismissive of the argument that to find consideration here would offend against the rule that consideration must move from the promisee. The court's judgement seems to indicate that that rule only means that the actions of the promisee must be a causal link in the process whereby the promisor receives a benefit, which

⁷⁷ For instance, as a result of his promise, the captain did not have to seek replacement crew, avoided delays and made sure the existing crew continued to work.

⁷⁸ The defendants (Rofey Bros.) did not argue that the subsequent agreement was pursued by fraud. This is somewhat surprising in view of the fact that they required prompt performance to avoid time penalties under the main contract.

⁷⁹ The view that lack of consideration is a separate and valid ground for refusing to enforce an agreed variation of a contract was recently confirmed by comments of Tucker J. in *Atlas Express v. Kafco* [1989] 1 A.E.R 641 at 646.

⁸⁰ [1979] 3 A.E.R 65.

⁸¹ See *Shadwell v. Shadwell* (1860) 9 C.B (n.s) 159, which supports the view that the performance of a contractual duty owed to a third party can be good consideration for a promise. See also, *The Euromeydon* [1975] A.C. 154; and the *New York Star* [1981] 1 W.L.R. 138.

may emanate from elsewhere.

The failure or reluctance of their lordships to go as far as saying that *Stilk v. Myrick* was dead and buried is a missed opportunity. Instead they still stressed the need to find consideration, albeit within wider limits, as Russell L.J. makes clear:

"Consideration there must... be but in my judgement the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties of the contract where the bargaining power are not unequal and where the finding of consideration reflects the true intention of the parties."

Despite this insistence on consideration in some form, it could be argued that the basic principle lying behind *Williams v. Rofey Bros.* is that an agreed variation of a contract should always be regarded as binding in the absence of fraud or duress.

Another important consequence of this case is that it does cast some doubts or at least, opens up the possibility of reconsidering landmark decisions such as *Pinnel's case* and *Foakes v. Beer*. After all, the parallel is obvious: whether one is dealing with a stricken creditor or a stricken debtor, in certain circumstances, the economic imperatives may dictate that financial adjustments should be made, the doctrine of consideration notwithstanding.⁸²

Even though the decision in *Williams v. Rofey Bros.* has been regarded, rather surprisingly, as indefensible by some,⁸³ it has generally received a warm reception both in England⁸⁴ and other common law jurisdictions.⁸⁵ If I have discussed this decision in detail it is because I think it holds some very important lessons for the courts of Common Law Cameroon. In the Cameroonian case of *Lucy Effiom v.*

⁸² Adams and Brownsword, "Contract, Consideration and Critical Path" (1990) M.L.R. 540.

⁸³ For example, Coote, "Consideration and the Benefit in Fact and Law" (1990) 3 J.C.L. 23.

⁸⁴ Halson, "Sailors, Sub-Contractors and Consideration" (1990) 106 L.Q.R. 183; Adams and Brownsword, *op. cit.* note 82.

⁸⁵ For New Zealand, see Chen-Wishart, "The Enforceability of Additional Contract Promises: A Question of Consideration?" (1991) 14 NZULR 270.

Mafcoop (supra), it was seen how the court rejected the plaintiff's claim for an additional promised sum on the unconvincing ground that there was no *consensus ad idem*. Clearly, to seek the metaphysical essence of *consensus ad idem* only amounted to a denial of the contract modification (and justice). It is submitted that the same kind of benefits (or factual consideration) that Glidewell L.J. attributed to the defendants in *Williams v. Rofey*, are easily discernible in the *Lucy Effiom* case. By promising to pay an extra sum in return for the plaintiff's performance, the defendant was spared the trouble and expense of looking for a new contractor and even more worrying, of looking for proper warehousing facilities to store their farmers' produce for that year. There was also no duress involved in the *Lucy Effiom* case since there was evidence to indicate that the local government engineer (the official supervisor of such projects) had in fact, suggested an extra payment, which if true, would make a defence of duress difficult to support.

Strictly speaking, *Williams v. Rofey* is not binding on Cameroonian courts, it being a post-1990 decision. But it does have strong persuasive force and it would be preposterous for a Cameroonian court to decline to follow it only on account of the fact that it is post 1900. The reasoning and the commercial sense behind the *Williams v. Rofey* decision is clearly unassailable. In adopting a factual, rather than a legal,⁸⁶ definition of consideration in that case, the English Court of Appeal has given effect to a subtle but significant change in the law relating to modification of contract. The law in Cameroon will do well with this change too.

The *Lucy Effiom* case was decided in 1979 so the court did not have the benefit of the *Williams v. Rofey* decision. But it is also hoped that in future, Cameroonian courts might embrace the fledgling doctrine of economic duress to give effect to modificatory promises rather than insist on the presence of consideration which inevitably prevents the enforcement of such promises. True, the doctrine of economic

⁸⁶ The factual definition emphasises the fact of benefit or detriment while the legal definition, for which *Stilk v. Myrick* is often cited, recognises as consideration only those acts which the promisor was not already under a legal obligation to perform.

duress is not without its difficulties.⁸⁷ Even in England, it is still in its early stages and the burgeoning case-law is yet to put the doctrine on a clear footing.⁸⁸ The formal structure though is there, but it definitely will take sometime for the substantive jurisprudence to take shape.⁸⁹ This, however, should not prevent the Cameroonian courts from embracing the doctrine.

In the present bad business climate, business people should be allowed greater freedom by the law to arrange their affairs, in the absence of fraud or duress. It is significant to note that the law on the modification of existing contracts has been changed in Ghana to dispense with the requirement of consideration.⁹⁰ Even the rules in *Pinnel's case* and *Foakes v. Beer* have been abolished in Ghana.⁹¹ In the U.S.A too, promises to modify contracts are enforceable even though on the rather specious grounds that a contractor who has been promised an extra sum has the option of performing or refusing to do so and paying damages and that his abandonment of this option is consideration.⁹²

For the courts to continue to insist on the necessity of consideration for promises to modify existing contracts, in the absence of fraud or duress, is to deny enforceability to an important category of promises, namely, those that enable

⁸⁷ For an analysis of these difficulties, see Trebilock et al, *op. cit.*, note 39, 184.

⁸⁸ Phang, "Whither Economic Duress" 1990 53 M.L.R 107; and "Consideration at Crossroads" 1991 (107) L.Q.R 22.

⁸⁹ Cf. Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1984-85) 94 Yale L.J 997.

⁹⁰ Date-Bah, S.K, "The Doctrine of Consideration and the Modification of Contracts" (1973) 5 Rev. Ghana Law, 10; see particularly, **The (Ghana) Contract Act, 1960, act 25.**

⁹¹ The Contracts Act, 1960, section 8(2) provides: "a promise to waive a debt or part of a debt or the performance of some other contractual or legal obligation shall not be invalid as a contract by reason only of the absence of consideration therefor".

⁹² See Swan, "Consideration" In: Reiter and Swan, eds., **Studies in Contract Law**, 1980, 24 at 27.

businessmen to make what has been described by Llewellyn, as "the informal re-adjustment of a going business deal."⁹³ To deny the enforceability of such promises is to frustrate the expectations of businessmen. Such frustration by the flat mechanical application of the doctrine of consideration is most undesirable. The rule in *Stilk v. Myrick*, which is based on lack of consideration bought calculability only at the price of ignoring commercial reality.⁹⁴ It will be a pity if the courts of England and Cameroon continue to fail to sense this.

(4). *CONSIDERATION AND IRREVOCABLE OFFERS.*

The common law rule that an offer not made under seal or supported by consideration can be withdrawn at anytime before acceptance can work great hardship on the promisee in certain cases, notably in unilateral contracts, i.e. where the promisor contemplates, not the creation of mutual promises, but that his promise should depend upon the promisee's performance of the the act. Such contracts are often illustrated by the promise to pay £100 when the offeree has walked to York⁹⁵ or has climbed the flagpole⁹⁶ or to give a Cameroonian hypothetical example, when he has climbed Mount Cameroon mountain. Suppose the promisor spitefully revokes his promise before the performance is completed, should the law allow him to perpetrate undue hardship on the promisee under the fanciful argument that a promise is revocable anytime before it is accepted.

Suffice it to say that English courts have in practice, ignored this rule in cases where it would be unfair to uphold it: for example, where there has been clear (and

⁹³ Llewellyn, "*Common Law of Consideration: Are There Measures?*" (1941)41 Col.L.R. 863, 867.

⁹⁴ Adams and Brownsword, *op. cit.*, note 82, 541.

⁹⁵ *G.N.R v. Witham* (1873) L.R 9 C.P 16 by Brett. J.

⁹⁶ This is the example given by Llewellyn, "*Our Case Law of Contract: Offer and Acceptance, 1.*" (1938) 48 Yale L.J. 32.

expected) reliance on an offer. Cameroonian courts have done pretty much the same thing as the Bamenda Court of Appeal decision in *Bassum v. Youya*⁹⁷ suggests. In that case, the defendant had promised the plaintiff a certain block sum of money with which to start his own business if the plaintiff would first serve in his (defendant's) business. After having had the plaintiff's services for several years, the defendant tried to renege on his promise. It was held that he could not revoke his offer to pay plaintiff the promised sum.

What actually happened here is that the power of the offeror to revoke at anytime before acceptance was destroyed by the simple expedient of finding that there was a bilateral contract. Such a device was easy to use in this case because of the extensive dealings between the parties over several years. In such a situation the parties can more readily be held to have made a contract than in the case, say, of the offeror of a reward for finding a lost dog. That said, in the *Bassum case*, there was obvious reliance by the plaintiff on the defendant's promise and the court felt that the plaintiff had been shabbily treated. The significant thing about this decision is that, it shows that where appropriate, the Cameroonian courts may finesse the traditional rules and effectively limit the power of the offeror to revoke. This flexibility is most welcomed.

Another class of cases in this area which can pose difficult problems for the law is what may be termed 'requirement contracts' or 'blanket orders'. In terms of business use this is a very important class of contracts.⁹⁸ The typical kind of contract is that the supplier undertakes to supply goods to the buyer at a fixed price for a defined or undefined period of time. The difference between this type of contract and a typical sale contract is that the quantity of the goods that the buyer may actually purchase may not be specified and the buyer may in fact be free to purchase nothing. The usual analysis of this kind of contract is that the supplier is making a standing offer which can be revoked at any time. An enforceable contract

⁹⁷ *Supra*, note 31.

⁹⁸ Macauley, "The Use and Non Use of Contracts in the Manufacturing Industry" (1963) 9 *Prac. Law* 7 at 13.

may exist in respect of any orders that are given by the buyer before the order is revoked. This is, for example, the analysis of a case like *G.N.R. v. Witham*.⁹⁹ Here the buyer had given no consideration for the promise of the seller to supply. If the buyer undertook to buy everything that he might need from the seller, the seller may be bound to supply since the buyer has limited his freedom of action and has thereby provided consideration for the seller's promise to perform.

That decision has been echoed in the Cameroonian case of *John Mokake Elali v. Brasseries du Cameroun*,¹⁰⁰ where it was held that because the plaintiff had given no consideration for the defendants promise to supply drinks at plaintiff's off license premises, the plaintiff could not successfully bring an action against them for breach when without any reasonable notice, they refused to make any further supplies to him after a four year relationship. The reality in cases such as this is that people do not generally think of consideration or of taking the option by deed. Most people in the plaintiff's position would naturally think of the option or promise as really firm. For them, there is an express or implied undertaking to keep the promise or option open. Not to do so would in ordinary understanding be a breach of faith, which breach is most likely to result in serious loss to them. Yet, as seen in the two cases above, the common law, thanks to the doctrine of consideration (or rather the lack of it), prevents the offeree from having any claim and allows the promisor to turn his back on a deal deliberately made.

The general problem with this kind of case is that there may be reliance by the buyer on the seller as the source for the goods that the buyer may need to meet his commitments in a case where the buyer has not technically provided consideration. Fortunately the courts are sometimes more sympathetic to the loss suffered by promisees as a result of their reliance on an unjustifiably broken promise, even though they may not have furnished consideration in the strict sense of the word.

⁹⁹ (1873) L.R. 9 C.P. 16.

¹⁰⁰ *Supra*, note 64.

There seems to have been very few of these cases before the English courts¹⁰¹ but in both *Ambe v. Brasseries du Cameroun* and *Daniel Achuo v. Brasseries du Cameroun*, the courts found for the plaintiffs, respectively sole distributor and wholesaler of defendants' products. In both cases the defendants had brought to an abrupt end several years of business dealings with the plaintiffs. In each case, defendants main defence was that no consideration had been provided by the plaintiff and therefore no contract existed. Each time this argument was rejected. The court clearly felt that not only did contracts exist between the parties, but the plaintiffs had relied heavily on their course of dealing with the defendants.

It is perhaps significant to note that this problem has been found sufficiently important in the U.S.A for it to be specifically covered by the Uniform Commercial Code, section 2.306.¹⁰² The comment to that section makes it clear that the enforceability of this kind of contract may be threatened not only by the doctrine of consideration but also by the problem of indefiniteness. Both of these are handled by the imposition of a general requirement that the parties must act in good faith.

If the Cameroonian common law courts were to infer that in every bilateral contract there was an obligation of good faith on both sides, there would be an even stronger case for finding against suppliers like Brasseries du Cameroun who renege on their promise to supply their products out of spite. Regrettably, the doctrine of good faith is not recognised in Common Law Cameroon, the simple reason being that it has never been part of English Law. I would suggest that in the absence of a doctrine of good faith, the common law courts in Cameroon should respond to the problem of malicious revocation by imposing a requirement of reasonable notice of

¹⁰¹ An example is *Anglia Television Ltd. V. Reed* [1972] 1 Q.B. 60. It attracted a lot of comment, see Guest, 88 L.Q.R. 168; Ogus, 35 M.L.R. 423, and Clarke, (1972) C.L.J. 22.

¹⁰² Uniform Commercial Code, s.2.306:

"(2) A lawful agreement by either the seller or buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

withdrawal.

It is not possible to pursue the whole topic of revocability here but it is hoped enough has been said to indicate that the problem of the revocability of offers is complex and a court has to tread cautiously in giving a remedy that will be appropriate in each case. To refuse to grant any remedy simply on grounds of want of consideration may be grossly unfair in cases where there clearly has been reliance.

**(5). CONSIDERATION AND FAMILY (NON-COMMERCIAL)
ARRANGEMENTS.**

Two problems are involved here. The first one is common to all the situations so far discussed and relates to the function of consideration in determining what promises the law should enforce. This must be done no matter what is the context of the promise. The second problem, peculiar to non-commercial cases, is that the context is variable. In an ordinary commercial case reasons for enforcement and non enforcement are fairly obvious since the context indicates what kind of factors are likely to be important. Reliance, for example, may be a good reason.

Reliance, in the same way in the non-commercial context may well offer a good reason for enforcement, but it may not, if it should be the case that a perfectly adequate remedy is available outside the contractual context. Such differences in context between commercial and non-commercial cases make the application of the doctrine of consideration in non-commercial cases a very complex issue.

The case of *Ronate Tapong v. Joshua Mobitt*¹⁰³ illustrates this problem perfectly well. The parties had entered into an arrangement whereby the appellant agreed to marry the respondent's junior brother. In return the respondent paid a dowry to the appellant and her family. The appellant later on decided to pull out of the proposed marriage arrangement and undertook to repay all that she had received from the respondent. She did pay back some of it and then defaulted in payment of the rest.

¹⁰³ Appeal No. BCA/31/74 (Bamenda, unreported).

In an action for the residue, the Bamenda Court of Appeal, overruling the High Court, held that the respondent could not succeed as that would have offended against the rule that consideration must move from the promisee. Not only do I respectfully disagree with the court's approach to this case, I also find the result unacceptable. I consider the decision questionable on two counts.

The first one has already been discussed in chapter two, namely, that the court should have applied only native law and custom since that is what the parties clearly had in mind when they entered into the agreement. Customary law allows for the recovery of such sums, and there would have been no pedantic inquiry as to the provenance of the consideration as marriage is treated very much as between families rather than as simply between individuals. In other words, under customary law, it will be untenable to say that the respondent was not privy to the contract or that consideration did not move from him. After all, it must be remembered that it is he (the respondent), acting *in loco parentis* to his junior brother who actually paid the dowry, which is the consideration in this case.

The second one relates to the courts' application of the English contract law rule that consideration must move from the promisee. The Appeal Court took the view that the parties to the contract were the appellant and Jerome (respondent's junior brother). Accordingly, the respondent was a stranger to it. Delivering the judgement of the court, Inglis, J. said,

"Where the consideration is executory the contract is binding as soon as the promises are exchanged. In this case the action to enforce the contract should have been brought by the person from whom the consideration moved, and he is Jerome Doctor Mobitt. The plaintiff/respondent, even though he paid the dowry and conducted the negotiations which led to the contract, is a stranger and therefore cannot sue on the contract."

As already indicated above, I find the reasoning of the court to be strained and the results they arrive to be unsatisfactory. Even if one accepts, as the court chose to do, that English law and not customary law governed the issue, there are still sufficient grounds on which the respondent could recover, which would produce a much more sensible result.

One way of doing so would be to hold that the contract was between the appellant and respondent by which the former agreed to marry the latter's brother in consideration for a dowry paid to her and her family by the latter. On this construction the appellant would clearly be liable in breach for failing to honour her own part of the contract, i.e. refusing to marry the respondent's junior brother.

The court also based its decision on the rule of privity of contract by treating the respondent as a stranger to it and by intimating that had the respondent's junior brother, instead of the respondent himself, brought the action, he would have succeeded. Now, if one were to hold that the respondent was actually a party to the contract as I have proposed, the application of the privity doctrine here would be clearly untenable. I find support for my assertion in the decision in *Tweddle v. Atkinson*.¹⁰⁴ In that case, a son sued on a promise in writing made to his father by the defendant to give a marriage portion: the document contained mutual promises between the plaintiff's father and the defendant, who was the father of plaintiff's wife, and expressly provided that the plaintiff should be able to sue on the agreement. The claim was dismissed. Wightman, J., said "no stranger to the contract can take advantage of a contract, although made for his benefit."¹⁰⁵ And Crompton, J., added that a promisee cannot bring an action unless consideration moved from him.¹⁰⁶

If the plaintiff in the *Tweddle case* for whose benefit the contract was made is not allowed to sue, even with the help of an express clause stating he could do so, on the grounds that he was not privy to the contract and did not furnish the consideration, it is difficult to see how the brother of the respondent in the *Ronate Tapong case* could be expected to succeed had he brought the action himself. I still maintain that the parties to the contract were Ronate Tapong and Joshua Mobitt, which contract was entered into by the latter in his capacity as senior brother and head of family for

¹⁰⁴ 1 B. & S. 393 (Q.B. 1861).

¹⁰⁵ Id. at 398.

¹⁰⁶ Id. at 398.

the benefit of his junior brother, Jerome. It was therefore wrong and irreconcilable for the Appeal Court to concede in one breath that the respondent had actually paid the dowry (the consideration) and conducted the negotiations leading to the contract and then declare in another breath that he (the respondent) was a stranger to the contract.

May I point out that my citation of the *Tweddle case* does not mean that I approve of its results. I cite it only to refute the Cameroonian court's suggestion that the junior brother of the respondent (whom I consider only to be the beneficiary and not a party to the contract) would have succeeded had he sued. To hold as the court did in *Tweddle v. Atkinson*, that a man cannot sue on a contract unless he is party to both the contract and the consideration, are clearly unjust and unfortunate in some cases, as the *R. Tapong v. J. Mobit* case reveals. This has been recognised in England where such results are occasionally minimised by applying doctrines of equity. In that way the benefit of a contract is considered as a chose in action in which the actual party to the contract is treated as a trustee for the beneficiary who is deemed to be the *cestui que trust*, so that a suit can be brought in the name of the trustee for the benefit of the *cestui que trust*.¹⁰⁷ This cumbrous proceeding to overcome the two-fold difficulty of want of privity of contract and want of consideration has never been used in Cameroon, even though the *Tapong v. Mobit* case presented the courts with a rare opportunity to do so.

Another possibility that would have enabled the respondent to succeed, was for the court to treat the respondent as a joint promisee,¹⁰⁸ especially as it was not doubted that he actually made the payments to the appellant. This has the advantage in that it dispenses with the need to determine whether the respondent or his junior brother is the promisee. They will become joint promisee allowing either of them to bring an action. The joint promisee principle has been judicially acclaimed by judges and

¹⁰⁷ See *Vandepite v. Preferred Accident Ins. Corp.*, [1933] A.C. 70, 79.

¹⁰⁸ According to this principle, one joint promisee may sue even though the consideration was exclusively supplied by another. For an elucidation of this principle, see Coote, "*Consideration and the Joint Promisee*" (1978) 37 C.L.J. 30.

textwriters alike. In *N.Z Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*¹⁰⁹ Lord Simon saw it as an "attractive proposition" while both Treitel¹¹⁰ and Atiyah¹¹¹ have warmed to it. The position of the law no doubt remains that of the leading case of *Dunlop v. Selfridge* but the point that I am striving to make here is that the courts must try to be flexible in their interpretation and application of the doctrine of consideration, especially in non-commercial cases. The rules of contract were designed to deal mainly with commercial cases. Once they are applied outside that area, odd and strange results can be expected to happen.

6. ON THE NEED FOR REFORM OF CONSIDERATION.

It has been shown above that the doctrine of consideration has its absurdities. Holdsworth described it as somewhat of an anachronism,¹¹² while others have even called for its abolition.¹¹³ It must be said however that those who want it abolished have focused their criticism on those indefensible aberrations, ignoring the significance of the doctrine. Even the **Law Reform Committee 1937** is guilty of this biased approach. Others, such as Hamson¹¹⁴ have been more measured and realistic in their criticisms, by highlighting both the significance and weaknesses of the doctrine and proposing changes to some of the strange rules.

¹⁰⁹ [1975] A.C. 154, 180.

¹¹⁰ Treitel, *op.cit.*, note 19, now seems to treat it as stating the law. See also, *ibid*, "Consideration. A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) A.L.J. 445-446.

¹¹¹ Atiyah sees it as incidental support for his more general attack on the doctrine of consideration. See, **Consideration in Contracts: A Fundamental Restatement**, 1971, pp.41-42.

¹¹² *Op. cit.*, note 11, p. 47.

¹¹³ Notably Lord Wright, *op. cit.*, note 5 and Chloros, *op. cit.*, note 5.

¹¹⁴ *Op. cit.*, note 5.

For my part, I think what is needed in Cameroon is reform and not abolition. I have highlighted some problems to which the doctrine of consideration has given rise and I do not believe that these problems are so incurable as to make abolition the only solution. Therefore, instead of abolishing the doctrine, I propose that all those very technical and artificial rules which prevent the enforcement of certain classes of transactions recognised by commonsense and commercial reality as true bargains be excised from the doctrine or be changed in some ways.

For instance, the rule that consideration must move from the promisee has been shown to be capable of working injustice and yielding to strange results, especially in family and other benefaction cases. It has been denounced because it may "make it possible for a person to snap his fingers at a bargain deliberately made"¹¹⁵ and it is surely the most absurd rule of consideration. This rule should be dispensed with so as to enable a beneficiary to sue on a contract that was expressly made for his benefit, irrespective of whether he personally furnished consideration or not.

And so too is the rule barring enforcement of promises to perform an existing contract in return for a promise for a higher price lacking in economic sense. It has been argued that the position adopted by the Court of Appeal in *Williams v. Rofey* is the better one and Cameroonian courts would do well to adopt a similar position, rather than stick to the traditional rule as enshrined in *Stilk v. Myrick*. In the absence of fraud or duress, the courts should ignore all doctrinal complexities of pre-existing duty and focus on whether there was an arrangement or agreement. And if so, the new promise should be enforceable. By parity of reason, contracts to accept less than is due should also be enforceable, as long as the court is satisfied that it was not concluded as a result of undue pressure.

To give another example, where there clearly has been reliance to the detriment of the plaintiff as a result of the defendant's conduct, the defendant should not be allowed to hide behind the façade of consideration as his only defence to an action for breach or damages. I shall not further multiply instances of the poor or unjust

¹¹⁵ *Dunlop v. Selfridge* [1915] A.C., 847, 855, per Lord Dunedin.

working of the doctrine since they have already been discussed above.

Let me briefly consider here the suggestion that the doctrine of consideration be replaced as the test of intention by the sole requirement of writing. Such an idea was contemplated by the **Law Reform Committee 1937**. In paragraph 29 of their report, the committee take the view that writing is "persuasive evidence" of an intention not merely to promise, but to assume legal obligation in respect of that promise. There are two objections to this suggestion. The first one applies to both England and Cameroon and it is that, what is persuasive evidence is not the writing, but the form of writing. If a document is written in legal form, for example, by a solicitor or notary, the evidence is certainly persuasive. But to consider the mere act of informal writing (since the committee does not require any particular form of writing) as evidence of an intention to perform an act in law may greatly over-estimate the deliberation that usually goes with informal writing, especially in a country like Cameroon. It is significant to point out that the committee themselves waver in their view as to the persuasiveness of the evidence of writing. In paragraph 30 of their report, they state: "writing is good evidence of the fact that the words were used; but the writing affords no more and no less evidence of the intention with which those words were used than the speaking of the words."

The other objection is peculiar to Cameroon. To make writing the only test of intention in lieu of consideration begs the question as to what shall become of all those who cannot read and write. Any such move will be tantamount to a punishment for illiteracy. Yet, even those who are literate do not always put their transactions in writing, as it shall become obvious when the requirement of writing in contracts is considered in the next chapter. Writing, therefore, is not welcome as a test of intention in replacement of consideration. It may not be a bad idea though, to use it as an alternative so that a contract should be enforced by the law if either it is in writing or there is consideration.

Finally, the question has been mooted whether consideration should be replaced

with the civil law doctrine of cause.¹¹⁶ I very much doubt the wisdom of that suggestion in Cameroon¹¹⁷ or elsewhere for that matter. This is because such a move will not just entail the introduction of *cause* and all of the reasoning behind it but also some fundamental tenets of the civil law of contract such as contract-consent, as distinct from the common law contract-bargain. And my doubts are not dispelled by Chloros's¹¹⁸ painstaking attempt to show that the continental concept of contract-consent can be reduced into a set of simple and rational principles which can be incorporated into the English law of contract.

I believe that the correct approach is to work from what we have as consideration. Its defects must first be recognized after which must come the remedies. Thus far, it is hoped I have managed to do both. But can these remedies or changes be implemented in Cameroon without the help of legislation. I think not. The doctrine of consideration is so entrenched in the common law of contract and, judging by the vigour with which it is applied by Cameroonian courts, it will take more than judicial imagination to bring about any change. Hays¹¹⁹ has shrewdly and skillfully argued the case for legislative reform in the U.S.A while Llewelyn,¹²⁰ though persuaded by Hays's outline for legislative reform, remains unpersuaded that a legislative program, alone, can do the work. In the case of Cameroon, I am of the opinion that it is better that, where a defect exists, it should be removed by specific legislation. Indeed the American experience (and perhaps more appropriately, that of Ghana)¹²¹ supports, to some extent, the view that piecemeal reform of the consequences of

¹¹⁶ Chloros, *Op.cit.*, note 5, 157.

¹¹⁷ Mason, *op. cit.*, note 5, 847, also believes such course to be unwise.

¹¹⁸ Chloros, *op. cit.*, note 2, 140.

¹¹⁹ Hays, "*Formal Contracts and Consideration: A Legislative Program*" (1941) 41 Col.L.R. 849.

¹²⁰ Llewelyn, *Op. cit.*, note 93, 863.

¹²¹ For e.g., The (Ghana) Contract Act, 1960, act 25 abolishing the rule in *Pinnels case* and *Foakes v. Beer*, *Op. cit.*, note 91.

consideration may be preferable, say, to the wholesome adoption of civil law,¹²² or outright abolition.

2. CAUSE.

The doctrine of consideration has no place in the civil law jurisdiction of Cameroon. However, in addition to the need for serious intention and consent, the law in that part imposes a further requirement for the formation and validity of contracts: that all informal contracts must have a *cause*. But this theory of cause of obligation is one of the most controversial problems in French law.¹²³ Those who support the doctrine, such as Domat,¹²⁴ (who is credited with the theory),¹²⁵ Pothier,¹²⁶ and Capitant,¹²⁷ otherwise known as "causalists" and those against it or "anti-causalists", such as Planiol¹²⁸ and Walton¹²⁹ have for long made it their battlefield.

That notwithstanding, the commissioners charged with the duty of preparing the Code Napoleon followed Domat by adopting the theory of cause. The theory is now

¹²² Cf. Farnsworth, **An Introduction to the Legal System of the United States of America**. 1962, p.121.

¹²³ Extensive literature can be found in the **Dalloz, Encyclopaedie Juridique**, Vol. 1 (1951 and supplements) under the word, *Cause*.

¹²⁴ Domat, **Loix Civiles**, vol.1, t.1, s.1, para. 6.

¹²⁵ In discussing the origin of the theory of cause, Planiol points out that Domat created the theory. See Planiol, **Traité Elementaire de Droit Civil** (7th ed). vol.2, para. 1079.

¹²⁶ Pothier, **Traité des Obligations**, 1818.

¹²⁷ Capitant, **De la Cause dans les Obligations**, 1927. He is perhaps the most staunch and brilliant supporter of the doctrine in the modern era.

¹²⁸ Op.cit., note 125, see particularly para. 1037.

¹²⁹ Walton, "*Cause and Consideration in Contracts*" (1925) 41 L.Q.R. 306.

well enshrined in both the French and Cameroonian Civil Codes and represents one of the principal features of French Contract law, which gives more importance to the exchange of promises than to mere formalism.

According to the Cameroon Civil Code, there can be no valid contract without a cause. This is stated in Article 1108 as one of the four conditions¹³⁰ that are essential to the validity of a contract. Article 1131 provides that an obligation without cause or with a false or illicit cause, cannot have any effect. And Article 1133 defines the word unlawful: a cause is illicit when it is prohibited by law or when it is contrary to morality or public policy.

(1). THE MEANING OF CAUSE.

Neither Domat¹³¹ nor Pothier¹³² nor the Civil Code defines the word cause. A vast amount of literature has been written in an attempt to devise an accurate definition or to find a general definition which includes the three formulas of Domat, yet the word cause still lacks a stable value and still does not express a single idea. This has forced Planiol to conclude that the various classes of cause cannot by any ingenuity be referred to as a single principle:

"Les auteurs modernes ont beaucoup travaillé pour trouver une définition générale de la cause... Leurs efforts ont été vains; la raison est la multiplicité des notions comprises sur le nom de cause, a ce qui est hétérogène, il est impossible de donner une définition unique." ¹³³

¹³⁰ The other three being the capacity of the parties, their consent, and the existence of an object of the contract.

¹³¹ In indicating what he means by cause in the three categories of contract, Domat, *Op. cit.*, note 124, paras. 5-6, gives three different rules for finding the cause, but no single formula.

¹³² He too merely repeats the passages in Domat's 'Loix Civiles' in explaining the meaning of cause: "Every obligation must have an honest cause. If the cause does not exist, if it is false, or if it offends against good morals, the obligation is null, as well as the contract which includes it." *Obligation*, paras. 42-43.

¹³³ *Op. cit.*, note 125, para. 1035.

For that reason I shall not here attempt the search for a simple and straightforward definition of cause. But in so far as it is possible to explain briefly a matter which has often been considered in France to be of the greatest doctrinal difficulty and on which the best French authorities may offer different interpretation, I shall try to determine what it is. To do so, two important distinctions must be made.

The first one is that between the cause of the contract and the cause of the obligation.¹³⁴ For every contract, there are two parallel reasons or causes as to why the parties entered into it. On the one hand, there are personal, concrete and subjective motives, which may vary from contract to contract or from one party to the other of the same contract and on the other hand there is a logical, impersonal, abstract and objective reason, which is identical for all contracts of the same kind. The former, known as the cause of the contract, represents the motives why a party accepts to enter into a contract but does not constitute cause in the legal sense while the latter, known as the cause of the obligation, represents the reasons why he accepts to assume the obligation of the contract and it is this abstract reason which is the cause in the legal sense of the word. The importance of this distinction lies in the fact that when the cause is false, the contract is null¹³⁵ whereas an error as to the motive does not affect the validity of the contract.¹³⁶

The second distinction to make is that between *cause* and *object*. Article 1108 lists the object of the contract as one of the requisites for its validity. The distinction between cause and object is best explained this way: object provides an answer to the question *qui debetur?* (what is owing?), cause answers the question *cur debetur?* (why it is owing?).¹³⁷

¹³⁴ See Dagorne-Labbe, "*Distinctions entre Cause de l'Obligation et Cause du Contrat*" (1990) II J.C.P. 21546.

¹³⁵ See Civil Code, Art. 1131.

¹³⁶ Code Civil Art. 1110.

¹³⁷ Weill and Terré, para. 254.

Thus in trying to determine what the cause of a given contract is, one must eliminate both the motives and the object. However, because both are amongst the factors that cause the contract, one may conclude that the legal concept of cause involves a choice amongst various factors, and the selection of one having certain characteristics. Unfortunately, there is a striking lack of agreement on the criteria to be applied in making this selection, as Holland has rightly observed:

"It has long been settled in French law that every permissible agreement is legally binding, subject only to the proviso that every agreement must have a 'cause', the precise nature of which seems far from clear to French commentators themselves."¹³⁸

The attitude towards the struggle to find a single definition which will be appropriate both for situations in which there is no cause and for those in which the cause is illicit now seems to be one of inertia and resignation. Many French writers¹³⁹ now concede that in order to accomodate the actual practice of the courts, the cause in these two situations must be differently defined. That said, cause is still generally regarded as "*le mobile déterminant de l'obligé portant sur un ou des éléments objectifs*"¹⁴⁰ (the determining motive of the obligee resting on one or several objective elements).

At this juncture, no effort shall be made to analyze and compare the views of the various writers on the subject. I shall instead explore the doctrine as it has been applied by the courts. It will be noticed that the treatment of cause is less detailed than than given to the common law doctrine of consideration. This is because most solutions (though not all) reached by French law through the medium of cause would be achieved in English law by having recourse to a multitude of concepts, such as illegality, public policy, mistake, frustration and unjust enrichment. Since some of

¹³⁸ Holland, *The elements of Jurisprudence*, (12th. ed.), p. 284, cited in Newman, "*The Doctrine of Cause or Consideration in the Civil Law*" (1932) 30 Can. B.R. 665.

¹³⁹ Carbonnier, *Obligations*, para. 26; Ghestin, *Contrat*, para. 692, and Marty & Raynaud, para. 183.

¹⁴⁰ Maury, *Encyclopedie Dalloz*, *Verbo Cause*, para.11 (1951).

these concepts are treated in some detail in the next chapter, it is proposed to defer some treatment of the doctrine of cause until then, in order to avoid repetition.

(2). *THE DOCTRINE OF CAUSE IN CAMEROON.*

Regrettably, but not surprisingly, the debate on the doctrine of cause is yet to be taken up by Cameroonian jurists. It is not clear whether this silence denotes a complete acceptance of the doctrine as faultless or whether they have simply not addressed their minds to the issue. What is clear, however, is that the courts in Civil Law Cameroon have remained impervious to the criticisms that have been levelled against the doctrine, in the sense that they stick to it in its classical form. In other words, the concepts of Domat and Pothier may be rightly considered as the foundation of the doctrine of cause in Civil Law Cameroon, having been so adopted via the French Civil Code.

The classical doctrine of cause involves the consideration of three types of contracts: (i) bilateral or synallagmatic, in which both parties incur obligations; (ii) real, in which only one party is bound, his obligation arising from the fact that the other party has delivered something to him and (iii) gratuitous, in which there is no mutuality of obligations and no previous delivery.

In synallagmatic contracts, the cause of obligation is the counter-prestation (thing or service) which induces each party to obligate himself to the other. The cause of each party's undertaking is the undertaking of the other party.¹⁴¹

In real contracts¹⁴² the cause lies in the delivery of the thing which is the object of the obligation. This delivery is a condition necessary for the creation of a

¹⁴¹ For example, in a sale the thing sold is the purpose of the obligation of the buyer and the cause of the obligation of the seller. Therefore if it is completely destroyed at the time the contract is concluded, then the contract is void for two reasons, the obligation of the vendor being without object, while that of the vendee is without cause.

¹⁴² The four unilateral real contracts are *commodatum*, *mutuum*, *depositum* and *pignus*.

contractual bond and unless it is made, the parties are not bound by any obligation of restitution.

In gratuitous contracts, where the beneficiary does not incur any obligation, the cause of the donor's obligation must be sought in the motive of the gift or gratuity.

These concepts of Domat and Pothier have been approved by many writers and criticised by anti-causalists who insist that the notion of cause is quite unnecessary and in some cases illogical. I shall prefer not to be detained here by this debate, because not only the fact but the nature of cause seems to be settled in the law of France and Civil Law Cameroon.

Instead, I shall now move on to a more practical aspect of the doctrine - a brief consideration of its functions. There are essentially two: the requirement that every contract must have a cause and the requirement that the cause must not be illicit.

(a). The Absence of Cause.

According to article 1131 of the Cameroonian Civil Code, a contract with no cause has no effect. Cause, therefore, is of prime importance since its absence is fatal to the validity of the contract. The rule that absence of cause means no contract is clear enough as not to need much elaboration.

It should be said that in the type of contracts with which this study is mainly concerned i.e. bilateral contracts, the absence of cause is of infrequent occurrence. This is because in bilateral contracts, the cause consists in the mutual undertakings of both parties. This perhaps explains the lack of cases on this point in Civil Law Cameroon. This is not to say the courts have never declared a contract void for want of cause.

In *N. Pauline et G. Ricardo v. consorts D*¹⁴³, the parties agreed to create a company that would run and manage all the commercial and industrial affairs of G. Ricardo (presumably a French based business) in Cameroon. The capital was to be

¹⁴³ Cour Suprême, Arrêt no.85/CC du Juin 1973, (1976) 9 Rev. Cam. Dr. 62.

raised by the parties themselves through the purchase of company shares. Each party was therefore allotted a certain number of shares. The scheme never actually took off and the D brothers brought an action against Pauline and G. Ricardo for breach of contract or rather for failure to perform.

In their defence Pauline and G. Ricardo argued that the D brothers had failed to take out their share allotment and as such they could not be expected to perform their own part of the obligation. This defence did not find favour with the Yaounde Court of Appeal.¹⁴⁴ The Supreme Court, however, found little difficulty in quashing the court of appeal decision. Employing language of the classical school of cause, it said:

Attendu que, ..., dans le contrats synallagmatiques, l'obligations de chaque contractants trouve sa cause dans l'obligation envisagée par lui devant être effectivement exécutée, de l'autre contractant; que cette cause fait défaut quand la promesse de l'une de parties n'est pas exécutée ou s'avère soit nulle, soit de realisation impossible."

The court then went on to hold that by not paying or promising to pay for their shares, the respondents had not performed their own part of the obligations. The contract was thus lacking in cause and the appellants were entitled not to perform.

The interesting thing about this decision is that it demonstrates that the doctrine of cause does not exhaust its usefulness once the contract has been formed. It also ensures that the balance struck by the parties themselves in the first place is not disturbed during the subsequent life of the contract. It must be said that this extension of the doctrine of cause well into the post-formation period of the contract is the result of judicial activism, both in France and Cameroon, since that cannot be found in the earlier theories on cause. Such an extension has not always been welcomed by academics.¹⁴⁵

A better example of absence of cause is provided by the decision of the French

¹⁴⁴ It is not clear on what basis the appeal court found them liable. I have no record of their decision and the Supreme Court does not discuss the court of appeal decision, it simply quashes it.

¹⁴⁵ For example, Mazeaud/Mazeaud, *Lecons de Droit Civil*, Vol. 11, a, no. 266.

Cour de Cassation in *Beaubernard v. Pouverdau*.¹⁴⁶ In that case, the court dismissed a genealogist claim for services rendered in drawing the attention of beneficiaries to the rights of succession on intestacy on the ground that it lacked cause since it was very unlikely that the heirs would not have known without the intervention of the genealogist.

(b). Unlawful Cause.

The problem of unlawful cause is to be given further treatment when the issue of illegal contracts is considered in the next chapter, so there is no need for a detailed analysis here. It suffices to say that all contracts, bilateral, onerous and gratuitous are invalid if the cause is unlawful.¹⁴⁷ And the cause is unlawful if it is prohibited by law, or is contrary to good morals or public policy.¹⁴⁸

A typical example of cause contrary to law would be a contract to commit a crime but many other examples can be imagined. For instance, all contracts prohibited by statute, even if not declared void by statute, shall be invalid for unlawful cause.¹⁴⁹

Cause contrary to good morals presents a greater difficulty. There are many acts, the terms of which are not widely drawn, which may not be forbidden or punished by law, but which are generally considered immoral to such an extent that the law will not lend its assistance to any attempt to enforce agreements entered into with a view to them.

Finally, cause is unlawful if it is contrary to public policy. What constitutes public policy too can be elusive and may well vary from one country to another or

¹⁴⁶ (Ch. Civ. 1st. s. civ.) April 8, 1953 (1953) Dalloz J.403.

¹⁴⁷ Article 1131.

¹⁴⁸ Article 1133.

¹⁴⁹ See the Supreme court decisions in *Arret no. 85/CC du 7 Juin 1973* and *Arret du 16 Fev. 1978*, both of which are discussed under the head of illegal contracts in chapter 7.

from one system to the other.

I have so far sought to explain that the doctrine of cause is very much part of the civil law of Cameroon. Earlier, I mentioned that the doctrine of cause, despite its deep roots in the civil law of contract, has always been the subject of severe criticisms by anti-causalists. I shall now consider very briefly some of the arguments against the doctrine.

(3). *A CRITIQUE OF THE DOCTRINE OF CAUSE.*

The doctrine of cause, like consideration in common law is not without its difficulties. The classical theory of cause, although satisfactory in theory, does show its imperfections once one tries to put it in practice. This is largely due to the fact that the classical theory confines the courts to an investigation of the external elements of the contract. But contract is essentially an act of will and the justification of the obligation must be sought in this will. In large measure, cause is subjective,¹⁵⁰ including the ideas of principal motives and subjective inducement of the parties.

It is in the field of gratuitous contracts that these shortcomings are most evident. Because the will of the donor to divest himself in favour of the donee is not supported by any economic counter prestation, the investigation and discovery of cause in such contracts can be very difficult. Theoretically his will appears to be very abstract, without justification to rest upon. It has thus been said that the cause in gratuitous contracts is, in essence, the intended lack of economic counterpart.¹⁵¹

Supporters of the classical theory, while protesting that cause (in gratuitous contracts) is not the same as motive, find a cause in the anticipated happiness of the

¹⁵⁰ Maury, "*Le Concept et Role de la Cause des Obligations dans la Jurisprudence*" (1951) 3 R.I.D.C. 492.

¹⁵¹ Maury, "*Essai sur le Role de la notion d'équivalence en Droit Français*" (1920) pp.71-72, cited in Catala, "*The Cause of Obligation in French Law*" (1958) 32 Tul.L.R. 477.

object of the bounty or in the mental satisfaction, which is supposed to reward the doer of the generous act. Despite these protestations, it must be said that the distinction between cause and motive in gratuitous contracts especially is dubious, prompting one commentator to remark cynically that "if this is not motive, language has no meaning."¹⁵²

In order to alleviate some of the difficulties of the doctrine of cause, causalists and the courts have remodelled the notion of cause, not only with regards to gratuitous contracts but in the field of onerous contracts as well. By proceeding into a deeper analysis of the will of the parties, they have conceived a more complex theory which is more adaptable because of its greater subjectivity.

On the whole, the doctrine of cause in French law (and in Civil Law Cameroon) now appears strangely diverse. In onerous contracts, cause is the intended lack of economic counterpart or value received, which is always the same in contracts of the same kind. In gratuitous contracts, which rely precisely on the intended lack of economic equivalence, cause is the donor's determining motive, which relates to the objective element of the contract. The insistence upon economic equivalence in onerous contracts and the determining motive in both gratuitous and onerous contracts must not be contrary to the law, to public order and to good morals. It should be said nevertheless that the apparently multiple aspects of the cause of obligations hides a profound unity. The cause is always the element of justification¹⁵³ of the obligation, the legally sufficient motive.

Anti-causalists have always maintained that the doctrine is quite unnecessary and in some cases illogical and should be abandoned as a result. They argue that in essence, cause is simply a generalized reasonable motive for making a contractual promise and that the whole concept now lacks content. Even foreign observers do

¹⁵² Lee, "*Cause and Consideration in Quebec Code*" (1915) 25 Yale L.J. 539.

¹⁵³ Maury, *Ency. Dalloz* (1951), *Verbo Cause*, para. 177.

not seem to be convinced that cause serves any useful purpose.¹⁵⁴ According to Zweigert and Kotz,¹⁵⁵ for instance, the rule that a contract without a lawful cause is void, means no more than that a contract is invalid and unenforceable if, on reading of its whole content, it is contrary to law or morals.

Anti-causalists argue further that in the case of bilateral contracts, if one party's obligation has no cause, it is because the other's obligation has no object. Cause therefore, they claim, is a superfluous concept. To counter this charge, causalists have come forward with two answers. First, they admit that decisions which are founded on the absence of cause could also be justified by the absence of object, but point out that in some cases it is easier for the courts to rely on the former because the object, though trivial or elusory, cannot strictly be said to be non-existent. For example, in cases where the object is insubstantial rather than plainly non-existent, such as the one involving the genealogist,¹⁵⁶ the court may prefer to rely on cause rather than the object.

The second answer to the charge of superfluity is that cause serves to tie together the two undertakings. If the thing sold has perished at the time when the contract is made, the contract is void for want of object. Yet, the obligation of the buyer was complete; he had undertaken to pay a certain sum. It is only because of the connection between his undertaking and that of the vendor that he cannot be held to pay the price. And this connection is cause, it cannot be anything else. Moreover, the notion of cause is very necessary in dealing with illegality in contracts. If a house is leased for immoral purposes, its object, which is a house, is not illegal, since the object itself has no moral aspect. But the undertaking of the lessor, which is the

¹⁵⁴ Dawson, *Gifts and Promises*, pp. 113ff; Lawson, *A Common Lawyer Looks at the Civil Law*, pp. 159ff; contrast Markensinis, "*Cause and Consideration*" (1978) 37 C.L.J., 53, 54, but it must be said that he is concerned to show that French law, through the medium of cause, reaches the same conclusions as English law attains by a variety of conceptual routes, rather than to consider the question of whether cause itself is a single concept (or the usefulness of cause).

¹⁵⁵ Zweigert and Kotz, *An Introduction to Comparative Law*, vol. II, 1977, p. 79.

¹⁵⁶ *Supra*, note 146.

cause, provides the immoral intention or destination that makes the contract unlawful.

It is by now clear that there are some interesting arguments for and against the doctrine of cause. This is no place to settle the issue as I am primarily concerned with the application of the doctrine in Cameroon, and not with the conflicting versions of the doctrine. The Cameroonian civil law courts are very content to apply it in its classical form, regardless of these criticisms. For my part, I share the view that the doctrine has not only a moral basis,¹⁵⁷ but a definite practical value as well.

¹⁵⁷ Rouast, "*Enrichissement sans Cause*" (1922) R.T.D.C. 35, points out that cause in the doctrine is the same as cause in contracts.

CHAPTER SEVEN.

DEFECTIVE CONTRACTS.

The necessary ingredients for the formation of contracts both at common and civil law such as offer and acceptance, consideration and *cause* have already been considered in the previous two chapters. Yet it does not follow that where these requirements are satisfied, the contract automatically becomes enforceable or free from all defects. The contract may still be defective because the law disapproves of its purpose or the terms by which it seeks to achieve that purpose or because it has failed to comply with some prescribed formality.

This chapter is concerned with the various sorts of contractual defect. The word defective is used here as a term of convenience to refer to all those contracts that are described as void, voidable, unenforceable or illegal at common law and to those contracts that the civil law considers to contain some vitiating element (*vices du consentement*). I shall limit my investigation to two major categories. The first category deals with situations in which there are defects in reaching agreement, such as mistake (*erreur*) and misrepresentation (*dol*). The second one deals with defects relating to the validity and enforcement of contracts, precisely formality and illegality.¹

I. DEFECTS IN REACHING AGREEMENT

The parties may appear to have reached agreement when in fact such agreement was only obtained by mistake, misrepresentation or duress. When such is the case, any consent given is impaired, defective, and tainted by a vice that affects its

¹ Questions of enforcement and illegality are, strictly speaking, not vices of consent, whether in English or French law. However it is convenient to treat them in this chapter.

freedom. This is true of both the civil law and common law. As clearly stated in article 1109 of the Cameroonian Civil Code, consent is invalid when it has been given through error, extorted by duress, or obtained by fraud. These three are known as in French law as *vices du consentement* (vices of consent).²

English law, strictly speaking, does not refer to mistake, misrepresentation and duress as vices of consent but like the civil law, it treats them as factors that affect the reaching of agreement.³ In this sense, they correspond broadly to the civil law theory of *vices du consentement*. However, English law differs from the civil law in its conception of these factors. For example, it draws a distinction between the *common law* and *equity* in its treatment of mistake and adopts an objective approach when assessing these factors. In this study, only mistake and misrepresentation are considered.

1. MISTAKE AND ERREUR.

Under traditional English and French contract law, a contract is formed by the mutual assent of the parties involved. Given this theoretical underpinning, both systems have struggled to provide for the existence of mistake in the formation of contracts. Making provisions for mistake, however, involves the delicate balancing of the autonomous will of the individual and the reliance interest of the parties in the transaction. In other words, it involves a conflict between two fundamental policies: promoting consent and protecting reliance. On the one hand is the need to enforce contracts where the parties to it have consented to be bound. But where there is serious error, consent may be negated or nullified⁴ and the case for enforcing the

² See Souchon, *French Report*, In: Rodiere, ed., **Harmonisation du droits des affaires dans les pays du Marché Commun: Les vices du consentement dans le contrat**. 1978, p. 46.

³ See generally, Bell and Dann, *Great Britain and Ireland Report*, In: Rodiere, ed., *Op. cit.*, note, 2 p. 141.

⁴ *Bell v. Lever Bros. Ltd* [1932] A.C. 161, 217, per Lord Atkin.

contract is seriously weakened. On the other hand, there are many situations where, although their hopes are disappointed, the parties must be held by their bargains, if the stability and confidence in contractual bargains are not to be eroded.

Although the above dilemma transcends both the civil and common law systems, these systems do not treat contractual mistake in exactly the same way. For this reason, I shall examine the approach to contractual mistake in common law and Civil Law Cameroon separately, using English and French law as points of reference.

A. Mistake

It has become the custom for English textbook writers and commentators to concede readily that contractual mistake is a notoriously difficult branch of contract law.⁵ A great deal has been written on contractual mistake,⁶ yet the subject is still beset with problems of definition, with doctrinal difficulties, and with an archaic remedial system. One is equally perplexed by its refined distinctions, by the amount of controversy to which it has given rise, and by a singular failure to extract from the cases clear basic principles, applicable to all cases.

It is against this background that I shall attempt to tackle the problem of contractual mistake in Common Law Cameroon. My task is not made any easier by the thin local judicial dicta on the subject. However, it is not my intention to undertake an exhaustive survey of the subject since without sufficient local litigation, any attempt at a detailed treatment will only amount to a rehash of the law of mistake in England, the multiple facets of which have already received detailed treatment in textbooks and articles. My aim here is simply to find out what the local

⁵ See for example, Cheshire, Fifoot, and Furmston: *Law of Contract*, (12th. ed.) p. 228, and Grunfield, "*Reflections on Some Aspects of Operative Mistake in Contract*" (1950) 13 M.L.R. 50.

⁶ On the extensive literature, see Slade, "*The Myth of Mistake in English Law of Contract*" (1954) 70 L.Q.R. 385; Atiyah and Bennion, "*Mistake in the Construction of Contracts*" (1961) 24 M.L.R. 421; Stoljar, "*A New Approach to Mistake in Contract*" (1965) 28 M.L.R. 265. See also those cited in note 1 above.

courts have made of the English doctrine of contractual mistake in the few cases where they have in truth had to consider the question whether an agreement is or is not void on the ground of mistake.

Before I consider the fundamental rules of mistake, two features of traditional contract approach to mistake must be briefly mentioned. The first is the role of equity and the second is the distinction between mistake of law and mistake of fact.

For the present exercise, I have chosen to ignore the bifurcation of mistake into common law and equity.⁷ This is not to suggest that it is of no effect whatsoever; after all it has come to be accepted that a wider basis for relief against mistake is available in equity than at common law. It has been said that mistake may be a ground for relief in equity even though there may be no remedy at law,⁸ and mistake in equity only makes a contract voidable. I have decided to avoid the bifurcation because the common law and equity have never had separate jurisdictions in Cameroon. Besides, since the fusion of the common law and equity in 1873, it has become more difficult to justify this bifurcation. In fact, in **United Scientific Holdings Ltd. v. Burnley Borough Council**,⁹ the House of Lords were strongly of the opinion that common law and equity should no longer be regarded as distinct systems. It is true that these observations were not made in the context of contractual mistake, but they are clearly wide enough to embrace that topic. However, the rules of equity cut across whatever classification of mistake that one adopts.

As for the mistake of fact, mistake of law dichotomy, it is to the effect that, in order for a mistake to be operative at common law, the mistake must be one of fact, not

⁷ See generally Grunfield, *"A Study in the Relationship between Common Law and Equity in Contractual Mistake"* (1952) 15 M.L.R. 297.

⁸ Denning LJ, *Solle v. Butcher* [1950] 1 K.B. 671 at 693 (CA).

⁹ [1977] 2 AER 62.

law. This was established in the case of *Bilbie v. Lumley*.¹⁰ Again, equity may offer a more generous basis for relief when the mistake can be regarded as one of law.¹¹ Not much will be made here of the distinction between mistake in law and mistake in fact. It is enough to note that relief will sometimes be refused because the mistake that was made is said to be one of law rather than fact and where that is the case I will say so.

As already pointed out, judicial efforts at developing the law of mistake have been a constant attempt to allow and yet control the defence of mistake. The result of this effort has been to introduce into the law a number of requirements before the defence of mistake will be allowed.

The first requirement is that the mistake must be "fundamental". This has been variously stated in a number of formulations of the basis for relief for mistake. Thus Lord Atken in *Bell v. Lever Brothers* said,¹²

"We therefore get a common standard for mutual mistake, and to implied conditions whether as to existing or as to future facts. Does the state of the new fact destroy the identity of the subject matter as it was in the original fact?"

Thus Lord Denning M.R., in *Solle v. Butcher* said,¹³

"A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the parties seeking to set it aside was not himself at fault"

Even though the mistake may be fundamental, the usual approach is to go further

¹⁰ (1802) 2 East 469, 102 E.R. 448. This distinction is one that causes many difficulties. It has been argued that many of the cases that have purported to deny relief on the ground that the mistake was one of law and not one of fact are based on an unwarranted interpretation of the *Bilbie v. Lumley* case that first established the distinction. See Goff and Jones, *The Law of Restitution*, 1993, p. 145.

¹¹ *Chitty on Contracts*, vol. 1, 1994, p. 318.

¹² [1932] A.C. 161 at 226-227 (H.L.)

¹³ [1950] 1 K.B. 671 at 693 (CA).

and investigate the nature of the mistake. There is said to be at least two kinds of mistake - unilateral and bilateral. Bilateral mistake may be common or mutual. However, for the purpose of this exercise, I prefer to categorise cases of mistake according to the type of mistake that has occurred. In this respect, three kinds of mistake are discernible: mistake as to the identity of the other contracting party, mistake as to the subject matter, and mistake as to the nature of the transaction. Common law also admits of a separate category for those cases where a party to a contract may be so fundamentally mistaken that he does not even realise what type of document he is signing. This is described as *non est factum*.

(i) Mistake as to the Identity of the other party.

I have been unable to find any local cases on the mistaken identity of the other party, and it should hardly be surprising that there is none. Because commerce is yet to be depersonalised in Cameroon, almost every contract to which the identity of a party is crucial is concluded *inter praesentes*. Where that is the case, it is rare for a party to allege that he was mistaken as to the identity of the other. Even in England, cases of mistaken identity where the transaction takes place *inter praesentes* are rare. Some have even argued that it is impossible.¹⁴

In the absence of local case law, I shall be content to state in outline form only, the position in English law,¹⁵ which position the common law courts in Cameroon are expected to follow if and when confronted with the problem. Since English law applies an objective test to mistake, it is only satisfied by an affirmative proof of an intent to deal with a different person from the one actually dealt with.

The affirmative proof must be of the mistake of one person's identity for that of

¹⁴ Wade, "*Mistaken Identity in the Law of Contract*" (1922) 38 L.Q.R. 204; and Fifoot's *English Law and its Background*, p.64.

¹⁵ See Goodhart, "*Mistake and Identity in Contract*" 57 L.Q.R. 228.

another and not of his attributes.¹⁶ Thus in **Cundy v. Lindsay**¹⁷ the respondent proved that he intended Blenkiron & Co. and not Blenkarn (with whom he dealt) and in **Hardman v. Booth**,¹⁸ Hardman satisfied the court that he intended to sell goods to Thomas Gandell, partner in the firm, whereas the fraud of the unauthorised clerk, Edward Gandell, induced Hardman to deal with him. In **Ingram v. Little**,¹⁹ the plaintiffs claim was upheld on the ground that they had intended to deal with Hutchinson of Stanstead House and not with the rogue before them as such. These are examples of mistake as to the identity for which the court declared the contracts void.

These cases should be contrasted with **King's Norton Metal Co. v. Eldridge Merrett & Co.**,²⁰ where the appellant believed he was contracting with a partner in the firm Hallam & Co., which in fact did not exist. As the offer must have come from a living person, the Court of Appeal held that he must have intended the swindler Wallis, who ordered the goods in the name of Hallam & Co. and to whom they were sent. Thus the appellants were mistaken as to the attributes of Wallis, fraudulently misrepresented on the note paper, but both intended him and dealt with him.

¹⁶ But Williams, *"Mistake as to Parry in the Law of Contract"* (1943) 23 Can. B.R. 271, at 276, argues that a man's identity is no more than the sum of his attributes.

¹⁷ (1878) 3 App.Cas. 459

¹⁸ (1863), 1 H. & C. 803.

¹⁹ [1961] 1 Q.B. 31.

²⁰ (1897) 14 T.L.R. 98; see also *Phillips v. Brooks* [1919] 2 K.B. 243 and *Sowler v. Potter* [1940] 1 K.B. 271.

(ii) Mistake as to the substance of the subject matter.

To the subject-matter of the contract, the principle that the entire absence of a party's intent prevents the contract ever coming into existence, has three applications in English law: (a) the parties may be mistaken in that the object is non-existent at the time of making the contract; (b) the parties may intend different objects; (c) though having the same object in mind, one or both parties may be mistaken as to its "substance" (i.e., identity).

There appears to be no actual illustrations of situation (a) and (b) in the local case law. However, where there is a mistake as to the very existence of the subject matter, English law treats this as a case mistake and not as one of impossibility of performance. Thus in **Couturier v. Hastie**,²¹ the House of Lords held as void the sale of a cargo of corn, en route from Salonika to London, because unknown to the parties, the cargo no longer existed at the time of making the contract as it had already been disposed of at Tunis due to overheating. In **Strickland v. Turner**,²² the sale of an annuity, after the death of the annuitant, was held to be void, and the price recoverable as for a total failure of consideration. Again, non-existence of a marriage, the supposed subject-matter of a separation deed, rendered the latter void in **Galloway v. Galloway**.²³

The case of (b), where the parties intend different objects, is logically a case of ambiguity in expressing offer and acceptance, but as it results in each party intending a different subject-matter, hence an entire absence of *consensus ad idem*, it has been treated as mistake on the authority of the leading case of **Raffles v. Wichelhaus**,²⁴ where the sale of a cargo of cotton "ex Peerless from Bombay" was held void as two

²¹ (1856), 5 H.L.C. 673. See generally Atiyah, "*Couturier v. Hastie and the Sale of Non-Existent Goods*" (1954) 70 L.Q.R. 385.

²² (1852), 7 Ex. 208.

²³ (1914), 30 T.L.R. 531.

²⁴ (1864), 2 H. & C. 906.

ships of that name were sailing from Bombay. Whereas the plaintiff intended that in December, the defendant intended that in October.

In the third possibility, i.e. mistake as to the substance of the subject matter, the rule seems to be that even though the parties have the same object in mind, if they differ as to its substance, (i.e. identity), the contract is void. The analysis of the distinction between this and mistake as to qualities is a matter of considerable difficulty. Description is applied to both the substance and quality of the object. The general rule is that mistake merely as to quality does not render the transaction void. In **Scott v. Littledale**,²⁵ a contract for the sale of tea was held valid at law in spite of a mistake as to its quality and hence as to its value. Greatly diminished value may affect quality but it does not change identity; thus in **Kennedy v. Panama, etc., Royal Mail Co.**,²⁶ the contract was valid though of much less value through failure to secure a lucrative government contract on the faith of which they were bought.

That only mistake as to identity will suffice was underlined in **Bell v. Lever Bros.**,²⁷ where the respondent sought to recover in quasi-contract £30,000 paid to the appellant under an alleged mistake of fact. This was as to the validity of the compensation agreement under which this sum was paid in consideration of the release of the respondents by the appellant from a service contract under which he managed their West African interests. It was alleged that the compensation agreement was void as its subject-matter, the service contract, had lost its identity through breach by the appellant's failure to account for some £700 profit, made in the course of his employment. Such breach was held to render the service contract "voidable", but not to destroy its identity, hence the compensation agreement was binding and the money paid thereunder irrecoverable.

The question of mistake as to the identity of the subject matter came up for

²⁵ (1858) 8 E & B. 815.

²⁶ (1867) L.R. 2 Q.B. 580.

²⁷ [1932] A.C. 161.

consideration in the Bamenda High Court in *Jonas Puwo v. Ndi Cho Samson*.²⁸ The defendant undertook to supply the plaintiff with a gear box for a 20 ton Mercedes Benz truck model 26 x 24. The contract price was 1.8 million francs, of which one million francs was immediately advanced by the plaintiff. On taking delivery, he made the final payment; but on trying to fit the gear box into the lorry, it transpired that what was supplied was different from what had been ordered. In an action by the plaintiff for breach and recovery of the price, the court found as a fact that though the parties intended a gear box, they were mistaken as to the substance (identity). Consequently, the sale was void and the price recoverable as for a total failure of consideration. It should, perhaps, be said that the court did not have to decide whether the contract was void for mistake in this instance as they could still have arrived at the same conclusion by simply applying the principle that a man need pay for what another has not given, and may also recover money so paid on a total failure of consideration.

(iii) Mistake as to the nature of the transaction.

Affirmative proof of mistake as to the juridical nature of the transaction, similarly divorces the necessary intention from the ostensible dealing. Mistake as to the nature of the transaction is more commonplace in Cameroon. Such mistakes have mostly arisen in relation to written documents, either because the party in error cannot read (an illiterate) or cannot understand the language in which the document has been written (a literate Anglophone who does not understand French and vice versa). These are the type of mistakes for which the plea of *non est factum* is invoked in defence.

The problem of mistakenly signed documents is given further treatment in the next section. It is enough to say here that the general position at common law seems to be that if one party intends bailment, for instance, and the other sale, or if one party

²⁸ HCB/31/83 (Bamenda, 12-09-1984, unreported).

intends a loan and the other a gift, no legal relationship will be created. In **Olabi Fayez v. Cie Industrielle du Cameroun**,²⁹ the appellant entered into a contract with the defendant for the purchase of a new car. He paid half the price and signed a document written in French which he understood to be the purchase agreement when in fact it was a loan application (*demande de financement d'un vehicule*) to be raised on a Parisian bank. The loan application was unsuccessful, so, the appellant could not obtain the car. The Buea Court of Appeal held that the appellant's action for breach must fail as he had clearly misunderstood the nature of the transaction. In effect, no contract was ever concluded.

But error as to the contents of the document or terms of the transaction does not suffice to preclude formation. This corresponds to mistake as to attributes of the other party (as opposed to his identity) or mistake as to quality of the subject matter (as opposed to its substance). In **Howatson v. Webb**,³⁰ Webb was fraudulently induced to execute a mortgage in the erroneous belief that he was signing a reconveyance of the property which had been vested in him as nominee and was held liable on the mortgagor's covenant to repay.

The rule that error as to the terms of the contract will not suffice has also been underlined in the Cameroonian case of **Ukpai Meeka v. Agip (Cameroun) S.A.**³¹ The plaintiff, an illiterate, entered into a contract with the defendants, distributors of petroleum products, whereby he was to operate and manage one of the defendant's filling stations. One term of the contract was that the plaintiff would make cash payments for all products supplied to him. Another term was that the plaintiff would deposit 200.000 francs as a refundable guarantee to be paid upon termination of the contract. The plaintiff then paid some 500.000 francs into the defendant's account. The defendants believed that 200.000 francs of that sum was to cover the deposit with the rest as payment for supplies. It turned out that the plaintiff was expecting that

²⁹ HCSW/4/73 (Buea, unreported).

³⁰ [1907] 1 Ch. 1.

³¹ HCSW/56/74 (Buea, unreported).

sum to cover orders he had made because he brought an action claiming that he had erroneously paid that sum into the defendant's account, which sum the defendant refused to return. The defendants argued that they could only refund 200.000 francs if and when the contract was to be terminated and since the plaintiff was not seeking to do so, they had to keep that as deposit as per article 6 of the agreement. The Court of Appeal confirmed the decision of the trial court which had ruled in favour to the defendants. The Court of Appeal did not emphasise the difference between mistake as to the nature of the contract and mistake as to the terms, yet their decision is very much in line with the principle that error as to terms does not preclude formation of the contract.

(iv). Illiteracy, Language Problems and Documents Mistakenly Signed.

It happens sometimes that a party is induced by the false statement of another, to sign a written document containing a contract that is fundamentally different in character from that which he contemplated. Where that is the case, the party in error may be allowed to deny his signature by pleading *non est factum*. While such mistake is not confined to illiterate parties, it goes without saying that they are more vulnerable when it comes to written documents. In Cameroon the problem is further complicated by the use of two official languages - the majority of Anglophones do not understand French and the converse is even more true. In the light of these Cameroonian peculiarities, the problem of documents mistakenly signed must assume added importance.

English law has placed in a separate category these anomalous cases of mistake where parties have executed documents under a misapprehension as to their contents. The rule applicable in such cases has come to be that the mistaken party will escape liability if he satisfies the court that the signed instrument is radically different from what he intended to sign and that his mistake was not due to his carelessness.³² In

³² For origin of this rule, see Fifoot: **History and Sources of the Common Law** pp. 231-233, 248-249.

other words, he can invoke the plea of *non est factum*.

In the course of the development of the plea of *non est factum*, it was made available to a defendant who could not read, due to illiteracy or blindness, so as to enable him to escape liability upon proof that the written terms of the deed did not correspond with its effect as explained to him before he put his seal to it. It was thus held in **Thoroughgood's Case**³³ that if a person who could not read executed a deed after it had been incorrectly read over to him, he was not bound by it.

In the nineteenth century, the benefit of this plea was extended to those who could read. The justification for this was the insistence on the requirement of *consensus ad idem* in contract. Therefore in **Foster v. Mackinnon**³⁴ the defendant who had endorsed a bill of exchange in the belief that it was a guarantee, was not bound because his mind did not accompany his signature. A similar decision was arrived at in **Lewis v. Clay**³⁵ where the signature to a promissory note was fraudulently obtained in the erroneous belief that a private family arrangement was being witnessed.

While the extension of the plea to non-illiterates is welcome in Cameroon, it is illiterates who remain the most vulnerable as demonstrated by **Direct Suppliers Co. Ltd v. Dairu Kila**.³⁶ The respondent, an illiterate farmer, supplied coffee produce to the appellants who dealt in agricultural produce. The respondent received no money but was issued a receipt in standard form. One of the clauses appearing on the receipt was an acknowledgement that the price for any produce supplied had been paid. The respondent was made to thumb print a duplicate of the receipt with a representation that the receipt would be withdrawn when payment for the coffee was made. In an action for the price, the appellants contended that the receipt was clear

³³ (1584) 2 Co. Rep. 9a.

³⁴ (1869) L.R. 4 C.P. 711.

³⁵ 1897) 67 L.J.Q.B. 224; and in *Carlisle & Cumberland Banking Co. v. Bragg* [1911] 1 K.B. 489.

³⁶ BCA/28/74 (Buea, unreported).

evidence that payment had been made. Upholding the High Court judgement, the Buea Court of Appeal ruled that the contents of the receipt had been misrepresented to the respondent who was therefore not bound by the receipt even though he had thumb printed it.

The doctrine *non est factum* was given a face-lift by the House of Lords in **Saunders v. Anglia Building Society**³⁷ (known in the lower courts as *Gallie v. Lee*). In that case, the House of Lords tightened up the definition of operative mistake in cases of *non est factum* by restricting the category of people to whom it applies;³⁸ by requiring that the mistake must be a serious one; and by insisting that a person who carelessly signs a document cannot rely on his mistake even if he is unaware of its contents.³⁹ The burden of proof lies on the party invoking the plea. The main problem is to determine how different the signed document is from that which the mistaken party would have signed or intended to sign. There is no clear-cut formula laid down. In *Foster v. Mackinnon*, Byles J. talked of the written contract being "of a nature altogether different" while in *Saunders v. Anglia Building Society* the Law Lords came out with a flourish of expressions, such as "radically", "fundamentally", "basically", "totally", or "essentially" different in character or substance from the contract intended.

The difficulty facing a party who alleges that the contract he signed was altogether different from what he had in mind is well illustrated by the **Saunders case**. The plaintiff gave the deeds of her leasehold house to her nephew in order that he might

³⁷ [1971] A.C. 1004.

³⁸ The nineteenth century extension of the doctrine to those who could read was questioned by Salmon L.J. in *Gallie v. Lee* ([1969] 2 Ch. 17 at p.43) who described it as "one of the less happy developments of our law". But his suggestion that the doctrine should not apply to such persons if they were of full age and capacity was rejected by the House of Lords in that same case. However, the House of Lords seem to agree that the doctrine will not normally protect literate persons of full capacity.

³⁹ On this point, see Stone, "*The Limits of Non Est Factum After Gallie v. Lee*" (1972) 88 L.Q.R. 198, 209-210.

raise money on it. The nephew arranged for an intermediary, Lee, to raise the money on a mortgage of the house. A document was prepared which was in fact an assignment on sale of the lease to Lee. The plaintiff did not read the document but signed it after having been assured by Lee that it was a deed of gift to her nephew (who witnessed the document). Lee raised money by mortgaging the house to a building society but paid no money either to the plaintiff or to his nephew, and worse still, failed to pay the instalments due under the transaction. In an action against the defendant and the building society for a declaration that the assignment was void, she invoked the doctrine *non est factum*, contending that what she had intended was a gift of the property to her nephew, not its outright sale to the defendant. It was held that the doctrine of *non est factum* did not apply as her mistake was not sufficiently serious. The "object of the exercise"⁴⁰ was to enable the assignee to raise a loan on the security of the property for the benefit of her nephew - an object that would have been attained under the signed document had the defendant acted in an honest manner.

The case of **Anye Fambo Paul v. Ruben Anusi & Oumarou Abbu Mallam**⁴¹ also demonstrates that Cameroonian courts are not too easily inclined to accept the *ipse dixit* of a party who claims that the document he signed was completely different from that which he had actually intended. The plaintiff lent money to the first defendant with the second defendant acting as guarantor. The loan agreement and contract of guarantee was reduced into writing, thus fulfilling the formality enshrined in section 4 of the Statute of Frauds 1677. This memorandum captioned "An agreement for loan", upon which the action was brought was duly signed by all parties.

The first defendant defaulted in the repayment of the loan and in an action by the plaintiff, the second defendant invoked the plea of *non est factum*, claiming that even

⁴⁰ This was considered by Russell LJ in the Court of Appeal to be of paramount consideration ([1969] 2 Ch at 40-41).

⁴¹ HCB/90/89 (Bamenda, 06-08-90 unreported).

though he signed the document, it had not been read to him, neither did he read it.⁴² Consequently, argued his counsel, he did not understand the nature of the transaction. In the robust words of Epie J., this was indeed "an idle and absurd contention". The judge noted that "no oppression, duress, threat, coercion, domination, pressure or otherwise was exercised on the person of the defendant", and added that "no form of undue influence..., deceit or misrepresentation" was brought to bear on him. He then gave an enlightening summary of the general legal position on the doctrine *non est factum*, in which he discussed the cases of *Foster v. Mackinnon* and *Lewis v. Clay* and sought to distinguish the present case from those two:⁴³

"The situation in the case at hand is radically different. The 2nd defendant admitted in his evidence-in-chief that he signed exhibit "A" (the contract) as 1st defendant's surety. It is therefore preposterous, in the light of such claiming admissions, to contend that the second defendant was misled into executing the agreement or the document is fundamentally different in character from that which he signed. The simple truth is that the 2nd defendant was fully aware of what he was doing. He intended to sign a contract of guarantee and sign it he did. His mind accompanied his signature and went with the transaction".

The second defendant's plea of *non est factum* was accordingly rejected and he was held liable as the guarantor of the debt, the principal debtor, the first defendant, having failed to repay the loan.

Another significant change that was introduced to the doctrine of *non est factum* in the *Saunders case* was the quashing of the distinction between the character and the contents of the document. The effect of this distinction was that a defence of *non est factum* was only available to someone who had signed a document under a mistake about the character and nature of the document in question; a mistake about its details or its contents, however serious, would not do. This distinction was seen in its full

⁴² There was no suggestion that defendant was illiterate and since he himself did not say so, one is entitled to assume that he was not.

⁴³ It will be noticed that the judge did not at all mention the more recent case of *Saunders v. Anglia Building Society*. It is only a matter for speculation whether this was simply an oversight or that he did not consider it binding because it is a post 1900 English decision.

glare in *Howatson v. Webb*.⁴⁴ But in the *Saunders case*, the House of Lords virtually overruled *Howatson v. Webb*, holding that in future, any real serious mistake about the document signed could give rise to *non est factum*, whether it was a mistake as to character or as to contents. The Cameroonian courts, however, are still slow to take on board the rejection of this distinction. In *Ukpai Meeka v. Agip (Cameroun) SA*⁴⁵ the Buea Court of Appeal held that mistake alone as to terms of the contract was not enough to support a plea of *non est factum*. As this case was decided in 1974, it is not clear whether the Buea Court of Appeal was simply unaware of the rejection of the distinction or simply chose to ignore it because they felt it was not binding in Cameroon, being a post-1900 English decision. Whatever the reason, it is hoped that in future, Cameroonian courts shall ignore the dubious distinction between mistake as to character and mistake as to terms or contents and follow the House of Lords rejection of it, which is commendable.

The last change in the face-lift of the doctrine was the insistence by the House of Lords in the *Saunders Case* that the party alleging error must not have been negligent. Formerly, it was irrelevant that the signatory had been careless in not reading the document. This was demonstrated in *Carlisle & Cumberland Banking Co. v. Bragg*⁴⁶ where the Court of Appeal held that the defendant could deny his signature to a guarantee of an overdraft he had signed without reading, thinking it was an insurance proposal. But in the *Saunders Case*, the House of Lords overruled *Bragg's Case* and held that carelessness of this kind precludes the defence altogether.

The Cameroonian courts are yet to rule on the effect of negligence but it can safely be projected that they will not allow a careless party to successfully invoke the plea of *non est factum*. The decision in the *Anye Frambo case* does, in fact, lend itself to the interpretation that negligence will deprive the alleged mistaken party of the defence of *non est factum*. In that case, the defendant stated that he neither read the

⁴⁴ *Supra*, note 30.

⁴⁵ *Supra*, note 31.

⁴⁶ [1911] 1 K.B. 489.

document nor was it read over to him. Since he never claimed to be unable to read, he must have been careless not to have read the document. On this score alone, he would be denied the plea of *non est factum* on the strength of the *Saunders* decision. It must be emphasised however that the court rejected his plea of *non est factum* not on the basis that he was negligent, but because they did not accept his claim that he did not understand the nature of the transaction.

Finally, one must conclude this discussion on *non est factum* with a note about its vitality. There have been muttering about the continuing application of the doctrine from textwriters and the judiciary. For instance, it has been suggested that "It might have been wiser, ...to have discarded it altogether when society became more sophisticated";⁴⁷ while Salmon LJ has expressed the view that the plea has become "a dangerous anachronism in modern times".⁴⁸ These reservations are no doubt directed at England, and mindful of all the changes that have taken place since the doctrine was first used, it must be said that they are not entirely without justification. In the case of Cameroon, however, the picture is different. Illiteracy is still very much a social problem, coupled with the fact that even those who are literate may be confronted with either of the official languages that they may not understand. This means that people are more susceptible to make the kind of mistakes for which their only a defence may be a plea of *non est factum*. Since the law must be expected to take judicial notice of such social problems, any legal doctrine that can actually help in such cases, as the plea of *non est factum* does, is to be maintained. It will therefore be premature to describe the plea of *non est factum* as an anachronism in present day Cameroon. It is surprising that it is not pleaded as often as one might expect.

⁴⁷ Cheshire, Fifoot & Furmston, p. 262.

⁴⁸ In *Gallie v. Lee* [1969] 2 Ch at 43-44.

B. *ERREUR*

The Cameroonian Civil Code, like its French progenitor, does not define error. However, error has been defined by French *doctrine* as a false representation of reality.⁴⁹ Thus error may occur in the course of any intellectual process, but the law concerns itself only with the kind of error that involves the making of a juridical act such as a contract. In that sense, error is a false or inexact idea that a party to a contract has of an element of that contract.⁵⁰ Since consent is the expression of a party's will, any such consent prompted by error, challenges the validity of a contract as no valid contract can be made without the valid consent of the parties.

Like the common law, the civil law also has to grapple with the dilemma of protecting the freedom of the will of parties through the granting of appropriate relief to those whose consent has been vitiated by error on the one hand, and the need to protect the stability of transactions, which is strongly connected to the need to protect the interest of the other party who might not have shared in the error. To resolve these diametrically opposed interests, a compromise has been reached whereby not every mistake will lead to the annulment of the contract. I shall now sketch how the civil law in Cameroon goes about this.

The Cameroonian Civil Code only mentions two kinds of error. It says in article 1110 that an error can only be taken into account if it affects the substance of the thing contracted about - *erreur sur la substance même de la chose* - and that an error concerning the other party to the contract - *erreur sur la personne* - is not to be taken into account unless the identity of the other party was a principal ground for contracting. This categorisation of error into only two types is very restricted because it fails to take into account other possible forms of error, such as errors

⁴⁹ Weill & Terre, para. 159.

⁵⁰ Weill & Terré, para. 159; See also Litvinoff, "Error in Civil Law". In: Dainow, ed., *Essays on the Civil Law of Obligations*, 1969, at 222, 225-226; and Grelon, *L'erreur dans la liberalites*, R.T.D.C. 1981, 261.

involving the *nature* of the contract, or the thing which is the contractual *object*, or the *cause* of the obligation, or the *value*⁵¹ of the parties respective obligations. Once again, *doctrine* and *jurisprudence* have had to fill in these gaps in the Code. They broadly divide contracts into three categories - *erreur-obstacle*; *erreur vice du consentement*; *erreur indifferent* - depending on the seriousness of the error.

(i). *Erreur-Obstacle*.

According to the French doctrine of *erreur-obstacle*, only the two kinds of error - error as to substance and error as to the person - are to be considered as vices of consent. Other kinds of error not mentioned in article 1110 are not vices of consent, but rather obstacles to the formation of the contract.⁵² This is because they are deemed to destroy completely the consent of the party in error. It is a case of *errerr-obstacle* when the error relates to (a) the nature, (b) the object, or (c) the cause of the contract.

In French doctrine, an error in the *nature* of the contract is an insurmountable obstacle to the formation of a binding contract, which results in an absolute rather than a relative nullity.⁵³ French courts have thus annulled contracts where a party who intended to obtain a regular policy from an insurance company had actually joined a mutual insurance association through error⁵⁴ and where a party who intended to take a long term loan had erroneously consented to enter a deferred credit

⁵¹ Questions relating to the value or equivalence of obligations are governed by the doctrine of *lesion* (article 1118 of the Civil Code). For a discussion on this, see Chauvel, "*Erreur Substantielle, Cause et Equilibre des Prestations dans le Contrats Synallagmatiques*". In: *DROITS - Revue Francaise de Theorie Juridique*, 12 Le Contrat, 1990, p.93 et s..

⁵² See Aubert, *Notions et Role de l'Offre et de l'Acceptation dans la Formation du Contrat*. 1970, para. 286.

⁵³ Weill & Terre, para. 177.

⁵⁴ Req. 6 Mai 1878, D.P. 80.1.12, S. 80.1.125.

contract.⁵⁵ I have not found any case in which the courts in Civil Law Cameroon have annulled a contract because a party was mistaken as to its nature.

Error as to the thing that is the contractual *object* may arise in situations where the thing involved is not in the presence of the parties, and may be sufficient to vitiate the consent of the parties. The Cameroonian case of *Soitacam v. El Hadj. Ndamako Ahmadou*⁵⁶ provides an interesting example of error as to object. El Hadj Ndamako sold a small second- hand cement mixer to Soitacam, a construction company. The small mixer was kept alongside a much bigger one at Ndamako's building site. Soitacam despatched a driver to pick up the mixer. He arrived in Ndamako's absence and mistakenly collected the bigger one. Ndamako felt this was a matter of slight confusion but all efforts to get Soitacam to return the mixer for the smaller one for which they had paid, were fruitless. He therefore sued Soitacam for the return of the large mixer and for loss of its use. The *Tribunal de Grande Instance* of Foumban only ordered Soitacam to pay 50.000 francs, rejecting the plaintiff's other claims. On appeal, the Bafoussam Court of Appeal increased the damages to 200.000 francs and ordered that the mixer be returned. This time Soitacam appealed.

The Supreme Court, after having censured the lower courts for failing to examine and determine whether the contract between Soitacam and Ndamako was valid or tainted by error, proceeded to direct that two solutions were available to the lower courts: They could have either treated the large mixer as the thing that was the contractual object, in which case, there was a valid contract of sale with the property having passed to Soitacam so that Ndamako could not claim its return; or not treat it as the thing that was the contractual object, in which case, there was error to which must be applied the provisions of articles 1110 and 1117 of the Civil Code. By ordering the return of the large mixer without deciding on the status of the small one, the Court of Appeal, in the words of the Supreme Court, "*a implicitement, mais nécessairement considéré qu'il y avait erreur sur la substance même de la chose objet*

⁵⁵ Rennes, 26 Oct. 1950, Gaz. Pal. 1951.1.27.

⁵⁶ C.S. Arrêt du 22 Mai 1980. (1980) 19 & 20 C.L.R. 139.

de la convention". They could not then, observed the Supreme Court, with one stroke order for restitution against the buyer (thereby implying that the contract was a nullity) and at the same time award damages to the seller (thereby implying the existence of a contract).

Following that observation, the Supreme Court criticised the Appeal Court for awarding damages against Soitacam and ordering them to return the large mixer without making a corresponding order for the seller to either deliver the small mixer which the court considered to be the proper contractual object or to repay the 50.000 francs he had received for it. The seller had therefore been unduly enriched by the Court of Appeal judgement. On this point, it must be said in favour of the Court of Appeal, that it specifically ruled that the 50.000 francs earlier paid to the seller should be deducted from the damages he was to receive. Even if the Supreme Court based its finding of unjust enrichment on the damages that were awarded to the seller, it would still be difficult to support the unjust enrichment thesis. It must be recalled that Soitacam kept the large mixer for more than a year, depriving the seller of its use. It is this loss of use that the seller claimed in special damages to the tune of a reasonable 3.000 francs a day. By awarding the seller 200.000 francs less 50.000 francs he had received for the small but undelivered mixer, the Court of Appeal can hardly be accused of unjustly enriching the seller. It may be that some of the facts, strained and sieved through successive levels of appeal, were overlooked by the Supreme Court.

The unjust enrichment issue apart, the Supreme Court deserves credit for giving precision to the problem of error as to thing that is the contractual object in Civil Law Cameroon. Its directives are also in line with the position in France. In French law, what is usually termed error in the contractual object is actually, in more accurate language, an error that bears on the object of the performance of one of the parties.⁵⁷ From that perspective, rescission may be obtained not only by a party who made an error concerning the performance of the other party, but also by a party who

⁵⁷ See Ghestin, *La Notion d'Erreur dans le Droit Positif Actuel*, 1963, pp. 3-4 and 90-96.

made an error concerning his own performance. That is to say, rescission may be granted not only to a purchaser who, because of an error, did not buy the thing he really intended to acquire, but also to a seller (like the one in the *Soitacam* case) who, because of an error, sold a thing other than the one he intended to sell.

The third case of *erreur-obstacle* is that which relates to the *existence of the cause* of the contract.⁵⁸ In the Cameroonian Civil Code, the reason why a person binds himself by an obligation is called the *cause* of the obligation.⁵⁹ For a contract to be annulled because of an error incurred by one party the error must have determined that party's consent, that is, the error must affect the reason why the party consented to obligate himself or, in other words, it must be clear that the party would not have bound himself if such error had not been made.⁶⁰ The closest that the Cameroonian courts have come to deciding on mistake as to the *cause* of the contract was in *S.H.O. Africauto v. Nga-Ondoua Joseph-Marie*.⁶¹ The judgement does not state the full facts of the case but the essentials are that the appellant had employed the respondent on the basis of a collective labour agreement, which unknown to them at the time, was neither applicable nor binding on them. On the strength of this mistake, they were later to terminate the respondent's employment who then brought an action for the payment of what he would have earned for the remainder of his employment. The Yaounde Court of Appeal held:

Qu'en tout état de cause la S.H.O qui manifestement a commis une erreur en engageant Nga Ondoua Joseph sur la base de la convention collective applicable ne saurait se prévaloir de cette erreur pour refuser de payer les droits réclamés; que conformément à un principe juridique constant dans les relations contractuelles, nul ne peut se prévaloir des ses propres erreurs pour refuser d'exécuter ses propres obligations".

⁵⁸ For the categorisation of error as to cause as error-obstacle, see the critical observations of Flour & Aubert, para. 193.

⁵⁹ See generally, *supra*, chapter 6.

⁶⁰ See Ghestin, *Op. cit.*, note 57, p. 29.

⁶¹ CS, Arrêt No. 53 du 28 Mars 1972, [1972] 26 B.A.C.S. 3550.

That is to say, the appellants could not avail themselves of their error. Therefore, the respondent's claim must succeed.

The Supreme Court disapproved of that reasoning, pointing out that the Court of Appeal, by admitting the appellant's mistake without giving any effect to it, had failed to show any understanding of the scope or extent of error as a vice of consent in the formation of contracts. It accordingly quashed the decision and remitted the case to the Douala Court of Appeal. Although the Supreme Court did not make a positive ruling on the effect of the mistake, the tenor of its statement in quashing the Yaounde Court of Appeal judgement suggests that it considered the contract a nullity because the appellant was mistaken as to its *cause*. Since the reason why the appellants entered the contract was because of a mistaken belief that the collective agreement was applicable and binding, this is clearly a case of error as to the *cause* of the contract.

(ii) *Erreur Vice du Consentement.*

There are two types - error as to substance and error as to the person. Only these two are recognised by the article 1110 Civil Code.⁶²

Error as to *substance*, according to article 1110 of the Cameroonian Civil Code, is a cause of nullity of an agreement only when it bears on the very substance of the thing that is the object.⁶³ This kind of error must not be confused with error as to the identity of the object. Error as to the substance of the object concerns certain qualities of the object that are regarded as substantial, or essential, and are to be distinguished from other qualities that are only secondary, which will not lead to annulment of the contract. This conclusion was reached as a result of the adoption by

⁶² This article is only concerned with contracts. There are other provisions on mistake relating to non-contractual issues such as article 783 (succession), articles 180-181 (marriage), 2052-2053 (transaction).

⁶³ Maury, "*L'erreur sur la substance*" In: *Etudes Henri Capitant*, p.491; Malinvaud, "*De l'erreur sur la substance*" D. 1972, Chron. 215.

French courts⁶⁴ and *doctrine*⁶⁵ of the subjective approach in determining what amounts to substantial qualities.

A practical consequence of the subjective approach is that rescission is more widely available. This is because in deciding whether to grant or to deny rescission on grounds of error, the courts give great weight to the reason that prompted a party to contract for a certain object so that rescission is granted when the error concerns that reason, even though nothing may be wrong with the object itself if objectively considered. This widening effect of the subjective view on the granting of rescission is kept in check by strict requirements of proof of error, the onus of which lies on the party alleging error.

In *Mme Lando nee Ngouffo Regine v. Miko Njoh Jacques*,⁶⁶ the parties entered into a contract of lease in which the plaintiff let out property to the defendant. Rents were to be paid quarterly. It was a condition of the contract that the lessor would be entitled to rescind the contract in the event of non-payment of just one quarterly rent. The defendant failed to pay for two quarters and the plaintiff sued for damages and rescission. The defendant pleaded mistake, alleging that he had been mistaken as to the substantial qualities of the house he had rented, which according to him, had turned out to be unfit for human habitation. He contended that the contract was a nullity from the very beginning and therefore, no action could be brought on it. This no doubt was a trivial, if not idle, defence since the court found as a fact that the defendant had actually visited and examined the said property before the conclusion of the contract, never mind the fact that he had lived in it for over two years. The court had no difficulty in brushing aside the plea of error but more significantly, insisted that the defendant had failed to evince any proof of error whatsoever. So, it is not enough for a party to simply assert the he was mistaken, he must also be able

⁶⁴ Civ. 28 Janv. 1913; S. 1913, 1, 487, cited in Schmidt-Szalewski: **Jurisprudence Francaise 5 - Droit des Contrats**, 1989, para.30.

⁶⁵ Weill & Terre, para. 168, Planiol & Ripert (2nd. ed 1952) para. 218-221.

⁶⁶ JC No.211 du 6 Mars 1991 (Yaounde, unreported).

to prove that the qualities about which he was mistaken, were, for him, substantial.

As for error as to the *person*, article 1110 paragraph 2 of the Civil Code says that error is not a ground for nullity when it only goes to the person with whom one intended to contract unless the identity of the person was the principal reason for the convention. This kind of error may relate to either the physical or civil identity of the person or to the physical, intellectual, moral or even juridical qualities of the person.⁶⁷ It has never been contested that any error of this kind justifies the nullity of the contract *dès que la personne avait constitué la cause principale de la convention*.⁶⁸

Error as to the person does not appear to have occupied the time of the courts in Civil law Cameroon so far. Understandably, it is highly unlikely (though not impossible) for this kind of error to occur in Cameroon where the parties more often than not operate *inter praesentes*. Even in France cases of error as to the person are not commonplace. However, it is enough to say that error as to the person is operative in contracts *intuitus personae*, where the personal qualities of the other party are material.⁶⁹ Like error as to substance, error as to the person must touch on an essential, and an agreed quality of the person. Thus in the French case of *Saint Jean v. Beaume*⁷⁰ it was held that the nationality of the buyer was not enough to render the contract void because it was never a matter for consideration for the contract.

⁶⁷ Ghestin, *Le Contrat: Formation*, para. 410.

⁶⁸ Planiol & Ripert, t. VI, p.216, no. 182; Marty & Raynaud, *Obligations*, para. 143.

⁶⁹ The best example is gratuitous contracts. See Grelon, *op. cit.*, 50, p. 268, no. 10.

⁷⁰ Cass. Civ. 1er, 4 janv. 1980.

(iii). *Erreur Irrelevante*.

This is the third category of mistake. Unlike the other two, it has no textual basis. Yet, although the Civil Code says nothing whatever about it, it is agreed by *jurisprudence* that an error can be taken into account only if it is *excusable*.⁷¹ Cases in which a party has signed a document without reading it properly are often placed under this heading, even though they are not cases of mistake at all. Typically, an *erreur inexcusable* and therefore *irrelevante* occurs when the mistaken party had the means of acquainting himself with the true state of facts before entering the contract. The Cameroonian case of *Lando v. Miko Njoh Jaques*⁷² would make a good example of *erreur inexcusable*. In an action for damages and rescission for failure to pay rents the defendant raised the defence of mistake: in particular that he had been mistaken as to the substantial qualities of the house, which he claimed was unfit for human habitation. His plea of mistake was rejected not on the grounds of inexcusable mistake, but rather on the lack of proof of mistake. But having correctly noted as the court did, that the defendant had not only examined the property before occupying it but had actually gone on to live in it for over two years, one would have expected the court to at least explain the decision partly in terms of inexcusable error, rather than solely on want of proof of error. To base the decision solely on lack of proof is to send a wrong signal that were the defendant able to provide such proof, his mistake would have been excusable and therefore operative. Yet, that would not have been the case. The crucial factor is that he did examine the house so that he was in a position to know of its true state and condition. Any claims to a mistake of that condition, whether proven or not, must be considered as inexcusable and irrelevant.

The main conclusion to be drawn from the foregoing consideration of mistake under the civil law is that the Civil Code offers judges even less (than the common law) in the way of firm standards for solutions of mistake cases, and that where it

⁷¹ Weill & Terré, para. 174.

⁷² *Supra*, note 66.

does so, the rules are sketchy. The courts and doctrine have had to develop other rules to fill in the gaps and expand the scope of mistake to cover other situations involving mistake. The courts have not done much to give more precision to such general clauses like the requirement that the error be as to a *qualité substantielle* and most writers put the cases in a different order.

This state of affairs, as one would expect, has not helped in Civil Law Cameroon. It is clear from the few cases treated above that the trial courts especially have struggled to cope with the problem of mistake. At worst they get it wrong and at best they are guilty of fence-sitting, being unable to articulate any rules of law on mistake. Fortunately, the Supreme Court has been prepared, each time it has been called upon, to provide authoritative guidance on some of the issues.

7.1.2. MISREPRESENTATION AND DOL.

A. MISREPRESENTATION.

As a general rule a party must not make any false and misleading statements that induces the other party to enter into the contract. Where such is the case, there is misrepresentation and consent is said to be vitiated and the agreement not to be genuine. The law on misrepresentation in England used to be bogged down in technicalities until an attempt was made at reform by the **Misrepresentation Act 1967**.⁷³ Since then the law in England has been a mixture of the common law, equity and statute law, and further analysis reveals an intertwining of tort and contract law principles. The law is still complicated but the general effect of the Misrepresentation Act has been to improve the position of the injured party, whose remedies are now much in line with those of a party who suffers loss through breach.

The Misrepresentation Act 1967 does not apply in Cameroon, neither is there any

⁷³ For an analysis of this act, see Atiyah and Treitel, "*Misrepresentation Act 1967*" (1967) 30 M.L.R. 369.

other equivalent Cameroonian legislation. For that reason, those developments triggered in England by the 1967 Act cannot be said to have taken place in Cameroon. The law on misrepresentation in Cameroon is still firmly rooted in the common law and equity. No comprehensive coverage of the subject is planned here. This must be so because this area is yet to be the subject of much litigation in Cameroon. The present treatment is therefore limited to a summary of the more important rules and a brief consideration of the various types of misrepresentation.

(1). The Guiding Rules.

Only two main ones are considered here.⁷⁴ The first is that not all statements are actionable. In the context that a misrepresentation is an untrue statement of fact made by one party to the other which, though not forming part of the contract, is nevertheless one of the reasons that induces that party to enter it, such statements of fact, which are actionable, are traditionally distinguished from cheap sales talk, statements of opinions, statement of intention and statement of laws - which are not actionable.

This distinction is not always clear-cut and some believe it has now reached a stage of over-subtle complexity.⁷⁵ In *Bissett v. Wilkinson*,⁷⁶ an assertion that a piece of land would support 2,000 sheep was held to be merely a statement of opinion and therefore not actionable though it proved to be unfounded. But in *Esso Petroleum Co. Ltd v. Mardon*,⁷⁷ an expert's estimate of the future annual petrol sales of a filling station, resting upon negligently prepared data, was treated as a statement of fact and therefore actionable. The fact that the representor in the latter

⁷⁴ For more, see e.g. Allen, *Misrepresentation*, 1988, p. 12.

⁷⁵ Tillotson: *Contract Law in Perspective*, 1985, p. 164.

⁷⁶ [1927] A.C. 177

⁷⁷ [1976] Q.B. 801.

case was an expert or so held out himself was crucial.

The second important rule relates to reliance. As with promissory estoppel, the essence of misrepresentation is reliance - reliance on truth and reasonable conduct in pre-contractual dealings. It follows from this that the injured party, in order to rescind the contract or claim damages, must be able to show that he relied on the statement and that it induced the contract. The view is taken that once this is established, it is no defence that the representee might have discovered its untruth by the exercise of reasonable care. Thus in *Redgrave v. Hurd*,⁷⁸ a party who had been induced to buy a share in a business by an innocent misrepresentation as to its value was allowed to rescind the contract and recover the deposit paid, even though he had been given the opportunity of examining the accounts and so discovering the true position. It is doubtful if Cameroonian courts accept the *Redgrave* decision. Certainly not, if the Bamenda Court of Appeal decision in *S. Nsaiboti v. F. Ezeafor*⁷⁹ is anything to go by. In that case, the appellant attempted to rescind the contract of sale of a second-hand car on the alleged grounds that she had been induced into buying the car as a result of a representation by the vendor's sister that the engine and tyres were new. The court did not accept that there had been any such representation so the vendor's action for specific performance of the contract succeeded. But the judgement of the court also makes it clear that had any such representation been made, the appellant would still have failed in her attempt at rescission because, in the words of Thomas J.,

⁷⁸ (1881) 20 Ch. D. 1.

⁷⁹ BCA/6/1973 (Bamenda, 14-3-74, unreported).

"The evidence shows that the appellant did not exercise reasonable diligence in the transaction. Restricted though the doctrine of *caveat emptor* might be in its application to the contract of sale, its application in the buying of a second-hand car is most fitting..."

This case signals a departure by Cameroonian courts from the traditional English common law position. It shows that Cameroonian courts are very likely to deny relief to a representee who, given the opportunity to check the truth of the representation, chooses not to do so, or does not use or exercise reasonable care which may help uncover any untruths. The Cameroonian position is to be preferred to the one established by *Redgrave v. Hurd*. Where it is the advice or opinion of the representor that is being relied upon, the requirement that reasonable care must be taken in the forming and giving of that advice is obviously an appropriate one. Not surprisingly, it is now being said that the rule that the lack of care by the representee affords no defence to the representor should prevail only in cases of fraud; that today it should not apply where the transaction is wholly innocent;⁸⁰ and that an extreme want of care by the representee should be taken to mean that his reliance was unreasonable. One commentator has talked of the need "to do proper justice between the garrulous and the gullible".⁸¹

(2). Types of Misrepresentation.

Three types of misrepresentation are recognised in English Law, classified according to the state of the mind of the representor: (i) fraudulent misrepresentation (a dishonest assertion); (ii) negligent misrepresentation (not dishonest but careless); and (iii) a wholly innocent misrepresentation. All three can cause loss to the representee and all are actionable, with the remedies being widest in the case of fraud and then narrowing down in their availability for negligent and innocent

⁸⁰ See for example, *Howard Marine & Dredging Co. Ltd. v. Ogden & Sons (Excavators) Ltd.* [1978] Q.B. 574.

⁸¹ Sealy, *Damages for Misrepresentation*, (1978) C.L.J. 229, 232.

misrepresentation.

(i). Fraudulent Misrepresentation.

Lord Herschell in *Derry v. Peek*⁸² stated that "fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false". A person, however, who honestly believes his statement to be true, cannot be guilty of fraud, however careless he might be and the onus is on the plaintiff who alleges fraud to prove the absence of an honest belief. In England the remedies available for fraudulent misrepresentation are damages and rescission. It must be noted that the plaintiff's right to rescind was not affected by the Misrepresentation Act 1967.

In Cameroon the position is governed by the common law. Damages are recoverable for loss resulting from reliance on a fraudulent misrepresentation in a common law action for the tort of deceit. The plaintiff may also rescind the contract. It is convenient at this point to distinguish between what may be called "rescission for misrepresentation" and "rescission for breach".⁸³ Rescission for misrepresentation involves an allegation that there was a defect in the formation of the contract; and if these allegations are proven it follows that the contract is avoided *ab initio*. This means the contract is set aside and things restored, as far as possible, to the state in which they existed before the contract. Rescission for breach,⁸⁴ on the other hand, involves an allegation that there was a defect in the performance of the contract; and the existence of that defect does not lead to the conclusion that the contract should be treated as if it had never existed. It follows that a party who rescinds for breach can claim damages for breach of the contract, while one who rescinds for misrepresentation has, by treating the contract as if it never existed, *prima facie* lost

⁸² (1889) 14 App. Cas. 337.

⁸³ See Atiyah and Treitel, *Op. Cit.*, note 73, 370.

⁸⁴ Rescission as a remedy for breach is discussed in detail in chapter 8 below, see p.

the right to claim damages for its breach. Statements to the effect that a person cannot rescind a contract in part, while affirming some particular term, suggest that the buyer cannot both rescind and claim damages. There appears to be no direct English authority on this point, and the answer is by no means clear. In the case of Cameroon, the cases reveal that the buyer is either granted rescission or awarded damages but not both. This point can be illustrated with the help of two cases, one of which resulted in an award of damages and the other in the granting of rescission.

The case of *Tavalla Forchu v. Longla Joseph & Kanga Jean*,⁸⁵ represents the first instance. The plaintiff, an elderly illiterate octogenarian, bought a Toyota Hiace bus and put it to commercial use. The first defendant, a motor mechanic whom the plaintiff knew well, regularly serviced the bus. The vehicle developed some mechanical problems which the first defendant diagnosed to be a broken axle. This was promptly replaced. Shortly afterwards the plaintiff complained again about mechanical problems. This time the first defendant assured the plaintiff that the bus was in a very bad condition and advised that it should be sold for scrap. All this for a vehicle that was about a year old. Anyway, acting on that advice, the plaintiff asked the first defendant to seek a buyer. The second defendant was introduced as a prospective buyer and the plaintiff sold the car to him for a giveaway price, in the presence of the first defendant. There can be no doubt whatsoever that the bus was sold for a cut price because the plaintiff believed it to be heading for the scrap yard. But to the plaintiff's consternation, he saw the bus plying the roads in good condition immediately after the sale. It had not been destined for the scrap yard after all. He certainly had been deceived by the first defendant, so he brought an action for damages.

No doubt rehearsing *Derry v. Peek*, Inglis J. said:

"Deceit is a false representation made by the defendant knowingly, or without belief in its truth, or recklessly, careless whether it be true or false, with the intention that the plaintiff should act in reliance upon the misrepresentation which causes damage to the plaintiff in consequence of his reliance upon it."

⁸⁵ HCB/22/86 (Bamenda, 7-12-87, unreported).

He then continued by noting that the plaintiff, an illiterate, elderly man, had no knowledge about cars while the first defendant knew practically everything about the bus in question, having regularly serviced it. In selling the bus, therefore, the plaintiff had relied solely on the first defendant's assurances that the bus was in a very bad condition. Meanwhile only three months before the sale, the first defendant had repaired the axle and worked on the bus. From all these developments, the court was satisfied that the first defendant had knowingly made a false representation to the plaintiff about the condition of the bus, a representation upon which the latter had relied to his detriment. The plaintiff was accordingly awarded damages. It is interesting to note that the plaintiff did not ask that the bus be returned to him. Whether this was because he considered the second defendant to be a good faith purchaser is only a matter for conjecture. However, in the light of the court's observation that "there was no evidence that the second defendant knew of the representation or was a party to it", it is doubtful if the plaintiff would have succeeded in an action for the return of the bus.

In the second case, *Paul Senju v. Camer Industrielle*,⁸⁶ the plaintiff was able to rescind the contract because of the defendant's fraudulent representation. The plaintiff bought what was described as a "Bussing" Super Cargo lorry from the defendants for the price of 3.250.000 francs. He paid 1.000.000 francs and gave the defendants promissory notes to the value of the balance. The lorry was then duly delivered to the plaintiff but shortly after delivery, the engine was discovered to be faulty. The plaintiff's driver examined it and formed the opinion that the vehicle was not at all new as the defendants had claimed. It was towed to the defendants' premises where the plaintiff complained that it was not new but reconditioned; and demanded a refund of the part-payment he had made.

The defendants admitted that the vehicle was returned to their premises not long after delivery but maintained it was brand new when they sold it. They tendered a certificate from the manufacturers, a purported customs certificate and an expert

⁸⁶ WC/63/68 (Bamenda, 23-06-69, unreported).

automobile engineer's report in support of their claim that the vehicle was new. When these were put to strict scrutiny by the court, many irregularities were found. For example, the details in the manufacturer's certificate did not tally with those of the automobile expert and neither of the above corresponded with any of the numerical details found in the vehicle itself. Also, the details on the sales invoice of the said lorry were different from the details of the expert's report. It became clear that the vehicle represented as new in the expert's report and manufacturer's certificate was not the vehicle that was sold to the plaintiff.

The inconsistencies relating to the particulars of the lorry, the unsatisfactory nature of the evidence, the fact that the vehicle's engine was found to have been resprayed, the breakdown etc., all led the court to the conclusion that the defendants had fraudulently represented the vehicle to be new. It was accordingly held that the plaintiff was entitled to rescission and restitution.

(ii). Negligent Misrepresentation.

The common law traditionally entertained no action for damages for non-fraudulent misrepresentation,⁸⁷ which was classed as innocent, i.e. the maker believed it to be true (whether reasonably or not). However, in 1962 the Law Reform Committee⁸⁸ recommended that damages should be given for negligent misrepresentation, that is, where a statement is made in the honest belief that it is true with no reasonable grounds for such belief. Between the making of that recommendation in 1962 and its enactment in 1967, there was a significant common

⁸⁷ But there was an exception by way of an equitable remedy through the application of the general doctrine of "constructive fraud", i.e. an action would lie in negligent misstatement if there was a fiduciary relationship between the parties. See *Nocton v. Lord Ashburton* [1914] A.C. 932.

⁸⁸ See the 10th Report, Cmnd. 1782.

law development in *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.*⁸⁹ In a landmark decision on negligence, the House of Lords held that where a special professional or business relationship, short of contract, existed between parties a duty of care could be owed as regards statements made and relied upon (and which caused financial loss). It was this 'special relationship' principle that led to the decision in *Esso Petroleum v. Mardon* in which a pre-contractual statement was held to give rise to liability in tort.

In addition to the common law recognition of liability for negligent misrepresentation, section 2 (1) of the Misrepresentation Act 1967 also created a statutory liability for negligent misrepresentation. Unlike the common law, this does not depend on any 'special' relationship.⁹⁰ Instead the subsection requires the representor, if he is to avoid liability, to prove "that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true". I will not elaborate any further on the statutory changes. At least the fact has been established that in England there have been recent changes both at common law and in statute law which have seen the recognition of liability for negligent misrepresentation. The question to be determined now is whether there has been any such changes in Cameroon.

As concerns the statutory developments, that question has to be answered straightaway in the negative. This is because the Misrepresentation Act 1967, being a post-1900 statute, does not apply to Cameroon.⁹¹ It is therefore correct to say that there is no statutory recognition of liability for negligent misstatement in Cameroon. Even from a purely common law perspective, one may say that *Hedley Byrne*, being a post-1900 decision, does not apply to Cameroon, or is at best, merely persuasive. Be that as it may, there is evidence to suggest that Cameroonian courts have been

⁸⁹ [1964] A.C. 465; Stevens, "*Hedley Byrne v. Heller - Judicial Creativity and Doctrinal Possibility*" 27 M.L.R. 121.

⁹⁰ See *Howard Marine & Dredging v. Ogden & Sons* [1978] Q.B.574, which has been the subject of notes by Sills 96 L.Q.R. 15, and Sealy 1978 C.L.J. 229.

⁹¹ See chapter 2.

sensible enough to embrace the *Hedley Byrne* 'special relationship principle'. Traces of the *Hedley Byrne* 'special relationship principle' were first discerned in the West Cameroon Court of Appeal decision in *Alliance Trading Enterprises Ltd. v. SOCOPAO Cameroon S.A.*⁹² The respondents, acting in their capacity as customs clearing agents, negligently entered false information on customs forms of the appellants for which the appellants were fined by the Customs. In addition, the appellants suffered the humiliation of having their commercial activities investigated by the Gendarmes. The appellants had in fact been guilty of nothing - all their problems had been down to the respondents' negligence. Delivering the judgement of the court, O'Brien Quinn J. echoed the 'special relationship' principle, when he said,

"It is clear that a contract existed between the appellant and the respondent whereby the respondent agreed to be the customs clearing agent of the appellant, for remuneration. By the very nature of the customs clearing business it is one which is highly specialised and the appellant was rightly entitled to rely upon the skill and diligence of the respondent. If, therefore, such a specialised agent acts negligently to the detriment of its principal, the agent is liable to its principal for damages resulting from that negligence."

Nowhere in the judgement was *Hedley Byrne* mentioned, but in speaking as the judge did, it must be assumed that he was applying *Hedley Bryne* or was at least aware of it. Both cases i.e. *Alliance Trading* and *Hedley Byrne*, share important similarities. Firstly, it was crucial in both cases that the person making the statement did so in the exercise of some professional skill. Secondly, just as *Hedley Byrne* did for English law generally, this decision too can be credited with having given the judicial imprimatur to the recognition of liability in damages for negligent misstatement in Cameroon. This is probably the most important feature of both cases.

The application of *Hedley Byrne* may only have been implied in the *Alliance*

⁹² WCCA/2/1972 (Buea 23-3-72, unreported).

Trading case, but in the recent case of *Vincent Ndango Tayong v. Mbuy Sylvester*,⁹³ the Bamenda Court of Appeal did gather up and elucidate on the *Hedley Byrne* "special relationship principle". That case was a direct result of another case which the appellant had been involved in. And to understand it, one must first start with the original case. The appellant, a businessman, had been having problems with his bank over the handling of his account. He had noticed that for several years his account had been progressively debited, and wrongly. As he could not resolve the matter amicably with the bank, he decided to sue. The trial court found for the appellant and awarded him 4.287.000 francs in damages and costs. Both parties were not satisfied, so there was an appeal by the bank and a cross-appeal by the appellant.

The Court of Appeal felt that the best way to determine the issue would be to appoint an accountant to look into the disputed accounts. So here enters the present respondent, an accountant by profession, who was appointed as special referee to audit the account of the appellant with the bank from when it was opened up to the date of when the action was instituted. He prepared and submitted a report to the court. This report however was compiled from incomplete data. Frustrated by this, the Court of Appeal rejected the report and invited the parties to present their respective cases. When that had been done, the Court of Appeal, like the trial court, was satisfied that the bank had wrongly debited the appellant's account. The appellant was thus awarded the sum of 7.835.177 francs, in addition to what he had been granted by the trial judge.

After that judgement, favourable as it was to him, the appellant decided to bring an action against the respondent. The appellant charged that by failing to prepare a proper report, the respondent had been negligent, and that as a result he had suffered loss. In dismissing this action the trial judge noted that the respondent had stated clearly and unambiguously that the financial report was based on incomplete data. It was for that reason that the report was rejected. As the respondent had discharged his duty towards the court in good faith, and without misrepresenting the facts, he

⁹³ BCA/15/91 (Bamenda, 5-11-1991, unreported).

could not be guilty of negligence. The appellant, who was surely revelling in his role as *litigant extraordinaire*, having previously succeeded against the bank, appealed.

The Court of Appeal confirmed the decision of the trial court to dismiss the claim, but employed a wholly different reasoning. Recounting the cases of *Heaven v. Pender*⁹⁴ and *Donoghue v. Stevenson*,⁹⁵ the court said that for the appellant to succeed, there would have had to be a sufficiently close relationship between the parties to justify imposing upon the respondent a duty of care to the appellant. The court went on to state that according to *Hedley Byrne*, damages for negligent, though honest, misstatement may be awarded where such damage is occasioned by the breach of duty to take care, arising from the special relationship between the parties, in making of such statement. Such a relationship, the court continued, may either be general, e.g. solicitor and client or banker and customer, or it may be a particular relationship created ad hoc where the facts establish that there is an express or implied undertaking of responsibility. In the present case, the court concluded, the evidence suggested no special relationship whatever between the appellant and the respondent. The respondent was an officer of the court and any duty he owed was owed to the court. That duty, as was observed by the trial judge, had been discharged in good faith, even if not to the satisfaction of the court. What this case clearly lays down is the rule that in Cameroon, the *Hedley Byrne* principle cannot be extended to experts appointed by the court. The relationship between such experts and the parties is not special enough to merit the application of *Hedley Byrne*.

The above decision is not only welcome because of its elucidation of *Hedley Byrne*, it is equally important because it shows that Cameroonian courts will apply it where appropriate. If the courts were not to do so, the victim of a negligent misstatement may be left with no remedy of damages since the Misrepresentation Act 1967 does not apply to Cameroon. It must be remembered that prior to *Hedley Byrne* and the 1967 Act, there was neither common law nor statutory recognition of

⁹⁴ (1883) 11 Q.B.D. 503.

⁹⁵ [1932] A.C. 562.

negligent misstatement. Now, if Cameroonian courts were to stick to the reception statute which says that only pre-1900 English decisions and statutes of general application are binding, there would be left with no option but to deny to award damages to victims of negligent misstatement. The only remedy would be rescission which, if not barred, may not necessarily be an appropriate one, involving as it does the setting aside of the contract. The courts surely realise that such an approach is bound to results sometimes in strange and unjust results, so they are prepared to follow the recent common law development in *Hedley Byrne*. That can only be commended.

(iii). Innocent Misrepresentation.

It has just been shown above that before *Hedley Byrne*, there was, for most practical purposes, no separate legal category of negligent misrepresentation. A representation was either fraudulent or innocent. And innocent simply meant, not fraudulent. Before the advent of negligent misrepresentation, damages could not be awarded for non-fraudulent (innocent) misrepresentation, while rescission as already pointed out was not always appropriate since it involved setting aside the whole contract. It could be said, following the decision in *Alliance Trading v. SOCOPAO*, that the above is also true of Cameroon.

In England, there is still no right of damages for a wholly innocent misrepresentation - one honestly made upon reasonable grounds - but under section 2(2) of the 1967 Act, the court is given a discretionary power to declare the contract subsisting and to award damages in lieu of rescission if it would be equitable to do so. As the 1967 Act does not apply in Cameroon, the courts there are yet to be vested with any such jurisdiction. And in the absence of any local cases on innocent misrepresentation, one has every reason to conclude that the position in Cameroon remains that of the common law, which is that there is no right to damages for wholly innocent misrepresentation that does not have contractual force but there is a right to rescission. This means that like the pre-1967 English position, the position in

Cameroon at present is unsatisfactory since, in cases of wholly innocent misrepresentation, the entire transaction would have to be set aside (even though the representation may relate to a matter of relatively minor importance), if the any remedy at all were to be given to the representee. There is thus a strong case for a change in this area of the law.

B. DOL.

Next to *erreur* French law treats *dol* (fraud) as a second vice of consent. *Dol* may roughly correspond to fraudulent misrepresentation at common law but they are different concepts.⁹⁶ For instance, non-fraudulent or non-negligent misrepresentation, i.e. what is known as innocent misrepresentation at common law, is of no consequence in French law unless it produces *erreur*. Further, unlike misrepresentation under the common law, *dol* is not confined to representations so that the difficulty that one encounters in the common law in distinguishing representations of opinion or intention from representations of fact, or representation as to the future from those as to the present, do not arise in French law.⁹⁷

There are only two provisions on *dol* in the Cameroonian Civil Code. The Code does not define *dol*. It just stipulates in article 1109 that "there is no valid consent if consent was procured by *dol*". Then it goes on to provide in article 1116 that:

Dol is a cause of nullity of the agreement when the *manoeuvres* practised by one party are such that it is evident that without those *manoeuvres* the other party would not have contracted.

In French law, *dol* and *erreur* are inextricably linked. Traditionally, *dol* is considered as constituting a vice of consent only to the extent that it results in error on the part of the other contracting party. This widely held position has survived a

⁹⁶ David and Pugsley, *Les Contrats en Droit Français*, 1985, p. 260

⁹⁷ Nicholas, p. 97.

serious challenge by the decision in what is now a celebrated case.⁹⁸ In that case, an elderly lady had bequeathed certain things to her daughter and son-in-law to the exclusion of her son. He challenged that bequest, accusing the beneficiaries of certain *manoeuvres* against his mother. He cited as an example, the fact that despite her advanced age, she had been locked in a room for several hours and engaged in an unusually lengthy conversation prior to making the bequest. The court annulled certain acts of the transfer on the grounds of fraud, because the transferor had been victimised by the *manoeuvres* of the transferees, though such *manoeuvres* neither induced the transferor into an error, nor did they constitute duress. She had simply been induced into a state of exhaustion. So, despite being satisfied that the *dol* had led to no error, the court still went ahead to annul some aspects of the transfer.

This decision, though running against the accepted position, is not entirely baseless. It is noteworthy that the French Civil Code makes no mention of error in article 1116, its main provision on *dol*. This decision is also significant in that it separates fraud from error, and perhaps more importantly, places fraud between error and duress in the general framework of vices of consent, which could make of fraud a useful instrument to handle situations where undue influence is exerted on a person in order to distort his will.⁹⁹ Be that as it may, this decision has not succeeded in changing the traditional view that regards induced error as a component part of fraud. This view is widely supported by *jurisprudence*¹⁰⁰ and *doctrine*. As one commentator puts it, "*Ce n'est pas l'acte dolosif lui-même qui constitue le vices du consentement mais l'erreur qu'il provoque*".¹⁰¹

⁹⁸ La Cour de Colmar, Arrêt du 30 Janv. 1970. D. 1970, 297 note Alfandari; Sem. Jur. 1970, II, 16609, note Loussouarn.

⁹⁹ Stark, *Obligations*, paras. 424-426 (1972).

¹⁰⁰ Bonassies, *Le dol dans la conclusions des contrats*, These, Lille, 1955, p.133, has noted that, "*pour les tribunaux, il ne serait paraît faire aucun doute que le dol a pour effets d'entraîner dans l'esprit de celui qui en est victime, une erreur*".

¹⁰¹ Souchon, *Les Vices du Consentement dans le Contrat, Harmonisation du Droit des Affaires dans les Pays du Marché Commun*, (ed. Rodiere), French Report, p.

There is evidence to suggest that the courts in Civil Law Cameroon follow the above traditional position in France. In *Affaire Pothitos Emmanuel v. Louis Villano*,¹⁰² the appellant brought an action for nullity on the grounds that he had been misled into error by the *dol* of the respondent. The Supreme Court held, affirming the Court of Appeal, that the action must fail because there was no evidence of error on the part of the appellant. By not even bothering to address the allegations of *dol* the Supreme Court seemed to imply that, granted there was *dol* on the part of the respondent, such *dol* was immaterial since it had produced no error. This decision therefore underlines the position that it is not the *dol* per se that counts, but the error it produces.

(1). Conditions For Nullity on Grounds of *Dol*.

Two conditions have to be satisfied before a contract is annulled for *dol*. Both these conditions can be deduced from article 1116 itself.

Firstly, the *dol* must have influenced the consent of the other contracting party. In the words of article 1116, "it must be evident that without these *manoeuvres*, the other party would not have contracted".

Secondly, the *dol* must involve a contracting party. Article 1116 talks of the "*manoeuvres pratiquées par l'une des parties*". This means that the *dol* must have been perpetrated by a contracting party, and not emanate from a third party. As a general rule, if the *dol* emanates from a third party, the victim cannot succeed in an action for nullity. This does not mean that the victim is left without any remedy. His remedy lies in bringing an action for damages against the perpetrator of the *dol*.¹⁰³

At this juncture, it is necessary to introduce an interesting feature about *dol*. One

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¹⁰² C.S. Arrêt no 517 du 12 Juin 1962, (1962) no. 6 B.A.C.S.C.O.

¹⁰³ Weill & Terré, para. 185; Souchon, *Op. cit.*, note 2, p. 55.

that distinguishes it from *erreur*. *Dol*, unlike *erreur* which is treated as a question of fact, is regarded as a matter of law. The French *Cour de Cassation* has held that though the primary facts with regard to *dol* remain within the *pouvoir souverain du juge du fond*, the qualification of those facts is matter of law.¹⁰⁴ The significance of this is that appellate courts such as the French *Cour de Cassation* (or Supreme Court in the case of Cameroon) do have a larger role to play in the interpretation of *dol* than *erreur*.

It is a good thing that appellate courts have greater powers of interpretation over *dol* because it is not always a straightforward matter. That the *dol* must have been committed with the intention to induce the other party into error is accepted. This has been called the *élément psychologique*¹⁰⁵ of the *dol*. Therefore, a representor is not liable in *dol* if he was himself mistaken about the misrepresentation he made,¹⁰⁶ or was only being negligent, not fraudulent, in providing erroneous information.¹⁰⁷ In the latter case, the representor may be liable though not on *dol*.¹⁰⁸ That there must have been an act of deceit (*fait de tromperie*), or *manoeuvres* is also accepted. This is otherwise known as the *élément matériel*.¹⁰⁹ The problem of interpretation lies, however, in the meaning of the term *manoeuvres*. It is universally accepted that they must be illicit. But what exactly constitutes *manoeuvres*. For a start, it is not confined to representations alone. It may involve many things: tricks (*artifices*), lies (*mensonges*) etc. It is said to be an elastic word that looks more to the state of mind of the actor than the precise nature of the act itself.¹¹⁰ One serious question that

¹⁰⁴ Cass. civ. 30.5.1927, S 1928. 1. 105, note Breton; see also **Source-book** p. 371.

¹⁰⁵ Weill & Terré, paras. 181.

¹⁰⁶ Paris, Déc. 1934, S. 1935, 2, 190.

¹⁰⁷ Req. 3 Janv. 1900, S. 1901, 1, 321, note Wahl.

¹⁰⁸ See Trib. Gr. Inst. Brest, 5 Nov. 1974, D. 1975, 295, note Schmidt.

¹⁰⁹ Weill & Terré, para. 182.

¹¹⁰ Nicholas, p. 98.

has always troubled the courts is whether silence or *réticence* can be considered as a *manoeuvres*.

(2). *Réticence Dolosive* (Fraudulent Silence).

In view of the fact that contracts by their nature involve opposing interests, French law, like English law, starts from the premise that parties to a contract are entitled to cater for their respective interests. This means that in the absence of a duty of disclosure, silence carries no culpability. However, the duty to disclose whether it derives from agreement or from legislation is now much higher in French law than in English law.¹¹¹ This higher duty of disclosure in French law is no doubt a manifestation of the increased demand for good faith in contractual relations under the civil law.

The attitude of French law towards *réticence dolosive* has evolved over the years. At one point the courts adopted the position that fraudulent non-disclosure "was not sufficient, without some other circumstance, to establish a *manoeuvre illicite*"¹¹² i.e. a *manoeuvre* constituting *dol*. The present case-law consensus seems to be that *dol* can consist of the silence of one party concealing from the other a fact which, had he known, would have prevented him from contracting.¹¹³

Although Cameroonian courts may not have been directly confronted with the question as to whether *réticence dolosive* constitutes a *manoeuvres illicite*, there are instances in which a party has been found guilty of *dol* in circumstances that can only be described as *dol par réticence*. One such instance is *Affaire Olama Hubert v.*

¹¹¹ See generally Ghestin, "The Pre-contractual Duty to Disclose Information - French Report" In: Harris, and Tallon, eds., *Contract Law Today: Anglo-French Comparisons*, 1989, p.151.

¹¹² Cass. civ. 30.5.1927.

¹¹³ Nicholas, p. 99 cites many cases adopting this position.

Société Camerounaise de Banque.¹¹⁴ The plaintiff normally had his salary paid by direct bank transfer through the defendant bank. Over a certain period, he was being paid what was more than his actual salary. This was due to a mistake by the Ministry in charge of civil servants' salaries. The plaintiff certainly knew that his account was being over-credited due to an irregularity, yet he elected not to draw that to the attention of the authorities concerned. In fact he proceeded in spending the money. When this was discovered, the National Treasury, using its Treasury Rights, obtained the excess from the bank. The bank in turn started recouping it through monthly deductions from the plaintiff's account. The plaintiff unashamedly sued the bank for breach of contract. The court was quick to dismiss the action on the grounds of *dol* by the plaintiff himself. The *dol* in question no doubts derived from the plaintiff's dishonest failure to report the irregularity in the payments from which he was unjustly benefitting. As this did not involve any affirmative action by the plaintiff, one should be entitled to consider it as a case of *dol par réticence*. One may also add that the *dol* in the present case is not strictly speaking a vice of consent in the sense that it did not occur at the level of contract formation. Nevertheless the case is instructive in that it shows that silence or inaction can constitute *dol*.

(3). Proof of *Dol*.

It is a final requirement of article 1116 of the Civil Code that *dol* must be proven, not presumed (*il ne se présume pas, et doit être prouvé*). This however does not mean that it cannot be proved by simple presumptions or by legal presumptions. After all, *dol* being a juridical act (*fait juridique*), every means of proof is admissible.¹¹⁵ The maxim that *dol* is not to be presumed means no more than that it is not to be imputed without legal evidence. Nevertheless, it can be said that Cameroonian courts will expect proof of *dol* to be stronger than the mere

¹¹⁴ J.C. No. 297 du 10 Avril 1991, (Trib. G.I., Yaounde, unreported).

¹¹⁵ Cass. civ., 4 Janv. 1949, D. 1949, 135; Gaz. Pal., 1949. 1. 145.

preponderance of evidence. In *Affaire Koto Tokoto v. Neim Sylvestre*¹¹⁶ the appellant brought an action for nullity of contract (the sale of building) against the respondent. This action was based on claims that he had consented to the contract only because of the fraud and *dol* of the respondent. The only evidence advanced in support of these allegations was three letters that the appellant had written himself, one to the court and two to the relevant land authorities complaining about the contract of sale. Dismissing the action, the Court of Appeal held that the appellant had failed to prove the allegations of *dol* and fraud. It was not enough for the appellant to simply present letters he had himself written to the judicial and administrative authorities, as proof of *dol*. From the judgement it would appear as though the gravamen of the appellant's complaint was that what he paid was more than the market value of the building. To this the court responded by noting that any difference between the market and contract price, even if it were proven, did not necessarily establish *dol* and fraud "*en l'absence d'autres présomptions concordantes.*" In other words, the appellant was supposed to substantiate with the help of more concrete evidence or presumptions, his allegations of *dol* and fraud. On appeal, the Supreme Court agreed with every aspect of the Court of Appeal judgement. Perhaps the courts are tough on a party alleging *dol* because they consider it to be such a serious charge to be imputed on anyone except upon legal and convincing reasons.

¹¹⁶ C.S. Arret no. 11 du 29 Octobre 1968, (1966) no 14 B.A.C.S. C.O., 2325.

7.2. DEFECTS RELATING TO VALIDITY/ENFORCEABILITY.

Two issues are discussed in this section: formalities in contracts and illegality. With both issues, the problem is not the lack of agreement or consent. The parties may consent to a contract, agree on its terms and still discover that it is not valid in the eyes of the law or that the law will refuse to enforce it either because of the absence of some requisite form or because the contract is illegal or is tainted by illegality.

1. CONTRACTS AFFECTED BY INFORMALITY.

It has long been a general rule of both the common law¹¹⁷ and civil law¹¹⁸ that a contract need not be in writing to be binding.¹¹⁹ However, under both systems, there are a considerable number of statutory rules requiring certain contracts to be made in or evidenced in a particular form. This necessity for formal requirements in contracts has always been the subject of much debate in the common and civil law jurisdictions of the world, much of which has been critical of formal requirements.¹²⁰ Although these criticisms led to a climate of anti-formality in the

¹¹⁷ Cheshire, Fifoot & Furmston, *Law of Contract* (12th. ed.) p 226.

¹¹⁸ This is confirmed by Rieg, *Rapport sur les modes non formels d'expression de la volonté en droit civil français*, In: *Trav. Ass. H. Capitant*, 1968, t. XX, p. 40 : "Aujourd'hui comme en 1804, le formalisme apparait comme une exception, sinon une aberration".

¹¹⁹ I am not concerned with the kind of form that is required for promises without consideration like seals and deeds.

¹²⁰ Lord Wright: *Legal Essays and Addresses*, 1939, p.226; Holdsworth: *History of English law*, vol. vi, pp. 369-97, Law Reform Committee Report, April, 1953 Cmnd. 8809; Fridman, "The Necessity of Writing in Contracts within the Statute of Frauds" (1985) U. Tor. L.J., 43; Bridge, "The Statute of Frauds and Sale of Land

U.K.¹²¹ and France¹²² at one time, it has to be said that formal requirements have always been maintained and have indeed enjoyed a resurgence lately.¹²³

In Cameroon too, there is a welter of legislation on the subject of formality in contracts. Unfortunately, but not surprisingly, the subject is yet to receive the kind of attention it has so far attracted in France and England. This is a sad fact because, if anything, the problems raised by formal requirements in contract should assume more importance in Cameroon than in England and France, partly as a result of the cleavage between the received western laws and customary law rules on form and partly because of the high incidence of illiteracy in Cameroon. I now propose to consider the laws on formality in Cameroon, assess and evaluate their usefulness and then conclude that the requirements of form are for the most part out of step with current realities in Cameroon.

(1). FORMAL REQUIREMENTS IN CAMEROON.

Formal requirements in Cameroon consist mainly of writing, registration and stamp duty and notarization. In Common Law Cameroon, any discussion on formal

Contracts" (1986) Can. B.R. 59

¹²¹ See for instance, Law Reform (Enforcement of Contracts) Act, 1954.

¹²² Meurisse, R, "*Le Declin de la Preuve par Ecrit*" (1951) Gaz. Pal., 51.

¹²³ In the case of England, see for example, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which has replaced section 40 of the Law of Property Act 1925. Under the 1925 Act it was sufficient that a land sales contract be evidenced by a memorandum in writing but the 1989 Act now insists that a contract for the sale of an interest in land must be in writing, with all its terms incorporated in one document. In France, there has been much talk of a renaissance of formalism. See B. Berlioz-Houin & G. Berlioz, "*Le droit des contrats face a l'evolution economique*" In: *Etudes R. Houin*, 1985, p. 11; Ph. Le Tourneau, "*Quelques aspects de l'evolution des contrats*" In: *Melanges P. Raynaud*, 1986, p. 362, para. 29. There is also a recent spate of legislation requiring an *acte authentique* for the certain contracts. A good example is *La Loi du 3 Janvier 1967, pour le ventes d'immeubles a construire*.

requirements must start with the English Statute of Frauds 1677. It was this statute that introduced for the first time in the common law the requirement of writing in certain types of contracts. This being a pre-1900 statute of general application in England, it was incorporated into the law of Anglophone Cameroon as part of the received legislation. The relevant sections of the Statute of Frauds with regard to the requirement of writing can be grouped in three areas: first, sections 4 and 17 (subsequently amended by section 4 of the Sale of Goods Act 1893),¹²⁴ prescribe the writing requirement for certain classes of contract; secondly, sections 1, 2 and 3 state that conveyances of freehold interests in land and certain leaseholds must be in writing; thirdly, sections 7, 8 and 9 provide, subject to exceptions, that the creation of trusts on land, as well as the transfer of beneficial interests in all types of property, must be in writing.

Sections 4 and 17 have since been amended in England. Section 4 was first replaced by section 40 (1) of the Law of Property Act 1925 which required that a contract for the sale of land must be evidenced by a memorandum in writing. Then recently, on the recommendation of the English Law Commission Report on Transfer of Land: Formalities in Contracts for Sale etc. of Land (1987),¹²⁵ section 40 of the 1925 Act has been repealed and replaced by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, with the requirement that a contract for the sale of an interest in land must be in made in writing, incorporating all its terms in one document, or where contracts are exchanged, in each and signed by both parties. The category of contracts that were covered by section 17 of the Statute of Frauds is now contained in sections 1 and 2 of the Law Reform (Enforcement of Contracts) Act, 1954. They retain writing for contracts of guarantee if they are to be enforceable. It must be remembered however that these post-1900 legislative modifications to the Statute of Frauds do not apply in Cameroon.

¹²⁴ The Sale of Goods Act 1979 does not apply in Cameroon because it is post 1900.

¹²⁵ 1987 English Law Commission No. 164.

The received Statute of Frauds apart, there are Cameroonian enacted statutes of recent origin that subject certain contracts to some kind of formality, not merely for the purpose of enforceability, as is the case of those within section 4 of the Statute of Frauds, but also from the point of view of validity. These statutes apply to the whole country. One important such statute is the Registration, Stamp Duty and Trusteeship Code 1973 (hereinafter referred to as the Registration Code), article 10 of which provides for the compulsory registration within three months of their date of:

"Instruments under hand only recording synallagmatic agreements, in particular leases, sub-leases, transfers thereof, cancellations, subrogations, sales, exchanges, contracts, apportionment, ... insurance contracts, etc."

Another one is Ordinance No. 74/1 of 6th July 1974 (hereinafter referred to as the Land Tenure Ordinance 1974) establishing rules governing land tenure. It enacts in article 8 (1) that:

"Deeds to establish, transfer or extinguish real property rights, shall be drawn up by a notary, under penalty of being null and void."

The question that emerges here is whether these local statutes have replaced and superseded the received Statute of Frauds. The answer is not clear-cut. The Statute of Frauds has been applied in a few cases since the passing of similar local legislation. For example, in *Nelson Ikome Lyonga v. Raphael Akor Foncha*,¹²⁶ a contract to sub-let land was declared unenforceable by the Buea Court of Appeal, upholding the trial court, because it failed to satisfy the requirement of writing as laid down in section 4 of the Statute of Frauds. It is submitted that the court should have relied instead on the local legislation on the issue, which is the Land Ordinance 1974. The fact that the outcome would have been the same is irrelevant. Local statutory provisions, where they exist, should always prevail over any received ones.

The better view, therefore, is that adopted by the Bamenda Court of Appeal in

¹²⁶ CASWP/26/82 (Buea, unreported).

*Theresia Ewo v. Mary Sih*¹²⁷ in which the position of local statutes on formality vis-à-vis the Statute of Frauds came to a head. The contract involved the sale of a store in the respondent's premises. The contract, although reduced into writing, was neither registered in accordance with the Registration Code 1973 nor notarized as required by the Land Tenure Ordinance 1974. In an action for breach and failure to complete the contract price, the appellant argued that because the contract of sale was not registered as required by Registration Code 1973, he was not bound by it. The respondent for his part pointed out that because the contract was written, it had fulfilled the requirements of section 4 of the Statute of Frauds. Consequently, he argued, both parties were bound by the contract. Anyangwe J., delivering the unanimous judgement of the court, had this to say:

"The contract was for the sale of an interest in land. Therefore exhibit B (the purported contract of sale) would have, before the first day of July 1973, constituted a sufficient note or memorandum for the purposes of section 4 of the Statute of Frauds, 1677 to which reference was made in the oral arguments. However, with the coming into force of the Registration, Stamp Duty and Trusteeship Code on 1/7/1973, the registration of such instruments have become compulsory. Since the exhibit was, on the evidence, never registered, it was void and therefore unenforceable. We therefore agree with counsel for the appellant that the parties were not bound by it and that the learned trial Magistrate should never have admitted and given it legal effect".

It follows from the above that local statutes should take precedence over those provisions of the Statute of Frauds which they also cover. This is largely in the area of contracts relating to land which are now subject to the formal requirements of the Land Tenure Ordinance 1974 and the Registration Code 1973 and not section 4 of the Statute of Frauds, a fact that is well borne out by recent cases.¹²⁸ However, the other provisions of the Statute of Frauds not covered by local legislation continue to

¹²⁷ BCA/32/85 (Bamenda, 12-12-85, unreported).

¹²⁸ See for examples, *Nganga Ngassa Aloysius v. Alex Jabea Mbulu*, CASWP/10/85 (Buea, 17/7/85, unreported); *Andreas Lobe v. Jonas Houtchou*, BCA/10/83, Bamenda, 21-3-1984, unreported), both are discussed below.

apply. Thus as recently as 1987, the Bamenda High Court, in *Ngwa George v. Ngwa Martin*,¹²⁹ refused to entertain an action based on a contract of suretyship on account of the fact that there was no memorandum or note of such a contract as required by section 4 of the Statute of Frauds 1677. On the other hand, in *Anye Fambo Paul v. Ruben Anusi & Oumarou Abba Mallam*,¹³⁰ the second defendant who had signed as a guarantor to a loan to the first defendant, was sought to discharge with the debt after the first defendant had defaulted to pay. The court stressed the fact the contract of guarantee by being reduced into writing, had fully complied with the requirements of the Statute of Frauds 1677.

Mindful of some stinging criticisms against the Statute of Frauds and calls for its abolition, one is easily tempted to welcome the fact that some of its provisions have been rendered redundant in Cameroon. Yet, the Cameroonian legislator cannot be credited with any advance in the law since the locally introduced statutes are even more stringent than those of the Statute of Frauds. Unlike the Statute of Frauds, they require much more than mere writing or evidence of such. And while failure to comply with the Statute of Frauds only makes the contract unenforceable, failure to achieve the more stringent measure of formality required by the local statutes renders the contract void, not merely unenforceable. Having said all these, I must now point out that the issue here is less whether common law Cameroon needs the Statute of Frauds or some other local statutes resembling the Statute of Frauds, but, rather more broadly, whether Cameroon's modern legal system needs to insist upon the kind of formality which is inherent in some kind of requirement of writing.

Another important area in which special formality is required by the law is that of contracts involving an illiterate party. Such contracts are subject to the Illiterate

¹²⁹ HCB/37/87 (Bamenda, 17-04-1989, unreported); see also *Sylvester Ibeagha v. S. O. Bessong* (Suit No. CASWP/7/87) 1991 no. 6, *Juridis. Info.* 53, in which the Buea Court of Appeal, setting aside the judgement of the Fako High Court, held that the appellant could not be held liable on a contract of guarantee in the absence of any written evidence or memorandum as required by section 4 of the Statute of Frauds 1677.

¹³⁰ HCB/90/89 (Bamenda, 6-8-1990, unreported).

Protection Ordinance (Laws of the Federation of Nigeria 1958, Cap. 83).¹³¹ The pith and marrow of this ordinance appears in section 3, which stipulates:

"Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement-

(a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions; and

(b) if the letter purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person, and that the signature and mark was made by such person."

This is obviously a complex provision but I do not believe this to be the place to examine the various facets of the provision such as a determination as to who is an "illiterate" or who is a "writer" as contained therein.¹³² For now, it suffices to state that an important object of the statute is to ensure that the contents of a document are fully explained to an illiterate before he appends his mark on it.

Common law Cameroon is not alone in having specific legislation relating to formalities in certain contracts. While the provisions of the Statute of Frauds are peculiar to that part of the country, analogous enactments are also to be found the civil law part. This is hardly surprising in view of the suggestion that a French *Ordonnance* of 1566 and possibly a later *Ordonnance* of 1667, were the source of inspiration and format of the English legislation.¹³³ As a matter of fact, the Civil

¹³¹ This is contained in the Laws of the Federation of Nigeria, 1958 Cap. 83 and applies only in Common Law Cameroon by virtue of its past historical and legal links with Nigeria.

¹³² The ramifications of this ordinance are yet to be examined in Cameroon but for a discussion of the Illiterate Protection Ordinance in Nigeria, see Nwogugu, "An Examination of the Protection of Illiterates in Nigerian Law" (1968) 12 J.A.L. 32 and Aguda, "Illiterate Protection Ordinance Examined" (1962) 4 Nig.B.J. 35.

¹³³ For the view that the architects of the Statute of Frauds must have been influenced by European models, see Rabel, E, "The Statute of Frauds and Comparative Legal History" (1947) 63 L.Q.R. 174.

Law Cameroon, thanks to its French law connection, was always more formalistic than Common law Cameroon until the passing of uniform statutory enactments throughout the country.

In support of the above view it can be pointed that the law in Francophone Cameroon (and France), after paying lip-service to the principles of informal contracts,¹³⁴ proceeds to make writing and other kinds of form compulsory for many contracts except the most trivial ones. The requirement of writing may either be formal or evidential.

It is formal in some important contracts where the document must be drawn up by a notary or validated by a judge - a formality known as *acte authentique*. This formality is necessary for major domestic obligations such as adoption and marriage contracts, substantial gifts (art. 931), mortgages (art. 2127), and subrogation agreements (art. 1250). Where a notarized document is not needed, a privately signed document (*acte sous seing privé*) will suffice. An *acte sous seing privé* is needed, for instance, in cases where the parties agree to fix an interest rate different from that laid down by the law.¹³⁵

There are also some statutory enactments outside the Civil Code. Examples include article 1 of *La Loi no. 61/20 du 27 Juin 1961* which provided that all acts for the incorporation, assignment or conveyance and termination of real property rights must be executed and authenticated by a notary, failure of which renders the transaction void. This *loi* which previously applied only to civil law Cameroon¹³⁶

¹³⁴ Article 1108 of both the Cameroonian and French Civil Codes does not even mention form as one of the prerequisites of a valid contract. Some French writers have pointed to this absence of form in article 1108 as evidence of the laws preference for informal contracts. See Ripert & Boulanger, T.II, para. 40. And others have suggested that the principle of consensualism was already so deep rooted in the law that the draftsmen of the civil code did not find it necessary to include it. See Flour et Aubert, **Obligations**, vol. 1. para. 299.

¹³⁵ Art. 1907.

¹³⁶ It will be recalled that from 1961 to 1972, Cameroon was a Federation with two federated states of East (Francophone) Cameroon and West (Anglophone) Cameroon. The laws that were enacted for East Cameroon did not apply in West Cameroon and

has again been reiterated by article 8 (1) of the Land Tenure Ordinance 1974, which is of national application. It should also be noted that article 10 of the Registration, Stamp Duty and Trusteeship Code 1973 applies equally to Francophone Cameroon. The reason why the Registration Code 1973 and the 1974 Ordinance both apply throughout Cameroon is because, unlike the Statute of Frauds, peculiar only to Anglophone Cameroon and the provisions of the Civil Code, exclusive to Francophone Cameroon, they were enacted by the Cameroonian National Assembly (Parliament) after Cameroon became a unitary state in 1972.

Just as in Common Law Cameroon, there is also a formal requirement in Civil Law Cameroon for contracts involving parties who cannot understand French. This is found in Decree no. 60/172 of 20 September 1960 regulating the status and practice of notaries. It provides in article 21 that

"Toutes les fois qu'une personne ne parlant pas la langue française sera parties ou témoin d'un acte, le Notaire devra être assisté d'un interprète assermenté, qui expliquera l'objet de la convention avant toute écriture, expliquera de nouveau l'acte rédigé, le traduira littéralement, et signera comme témoin additionnel"

Although it talks of those who cannot speak French, there should be little doubt that this provision is aimed specifically at illiterates.¹³⁷ This requirement is quite stringent because it is simply not enough that a notary is involved. It also requires the presence of a sworn interpreter. According to article 35, failure to comply with article 21 renders the transaction void or at best, confers it no more effect than a privately signed agreement.

In some cases the requirement of writing in Francophone Cameroon is evidentiary only. That is to say if the transaction has to be proved, the party seeking to do so must adduce written evidence. A good example of this is provided by article 1341 of the Civil Code which provides sweepingly that consensual transactions involving

vice versa.

¹³⁷ I say so because at the time it was enacted, English speaking Cameroon had not yet joined French Cameroons. It is thus difficult, though not impossible, to extend this requirement to an Anglophone Cameroonian who cannot speak French.

more than 500 francs, can be proved only by written evidence. Article 1341 does not apply to agreements in business transactions. This is because under article 109 of the Cameroonian *Code de Commerce*, as now interpreted by the courts, the judge can consider oral testimony, when he considers such testimony desirable, to prove any transaction which is commercial in the technical sense unless the law expressly requires a writing. Thus in *Affaire Boutin Pierre v. Saugeres Rene*,¹³⁸ the plaintiff alleged that he had supplied goods to the defendant for which he was still owed 105,500 francs. In an action for that amount, the Douala Court of Appeal dismissed his appeal on the grounds that the transaction satisfied neither article 1341 of the Civil Code which requires writing or evidence of writing for all contracts over the value of 500 francs nor did it provide any *commencement de preuve* as allowed by article 1347. On further appeal, the Supreme Court of the former East Cameroon quashed the decision of the Douala Court of Appeal and ruled that as this was a commercial transaction, article 1341 did not apply. Article 109 of the *Code de Commerce* allowed the plaintiff the possibility to adduce oral evidence to prove the contract. The court went on to add that even if the appellant was a layman, he would still be entitled to the benefit of the exception afforded by article 109 of the *Code de Commerce* as long as the defendant was a businessman.

The above outline of the various ways in which legislative power in Cameroon has been used to limit freedom of contract by the imposition of formal requirements in certain contracts is not an exhaustive account of all such legislative intervention.

¹³⁸ Arrêt no 12 du 29/10/1968, B.A.C.S.C.O, p. 2326.

However, those considered are the more important ones and, therefore, provide one with a sufficient base with which to examine the justification or rationale of legal formalities in contracts in Cameroon.

(2). THE FUNCTIONAL JUSTIFICATION OF FORMAL REQUIREMENTS.¹³⁹

Let me start with the received Statute of Frauds. The statute itself said, in the preamble, that it was "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subordination of perjury." Three reasons for such an enactment have been ascribed, namely: the uncontrolled discretion of the jury; the rule as to the incompetence of certain witnesses; and the immaturity of contract law in the seventeenth century.¹⁴⁰ I shall not dwell on the Statute of Frauds since there are local legislation on which I prefer to concentrate.

Unlike the Statute of Frauds, the local statutes do not expressly state the reasons behind their imposition of formal requirements for certain contracts. Since whatever policies underlying these formalities are generally left unexamined in judicial decisions, it will be necessary to evaluate and examine here in general terms the basis or the *raison d'être* of formal requirements in contracts.

I shall begin by drawing from some of the papers that have gone before on this subject. Atiyah,¹⁴¹ for instance, has argued in favour of form, laying stress on the fact that it saves the cost of more detailed investigation and it minimizes the risks of error. According to Atiyah, these are the two most important reasons for form. In

¹³⁹ On the general problem of the rationale of legal formalities, see Llewelyn, "What Price Contract?" (1931) 40 Yale L.J. 704; Demogue: *Traité des Obligations en Générale*. 1923, paras. 235-237.

¹⁴⁰ Holdsworth: *History of English Law* vol. 6, 388; Willis, *The Statute of Frauds - A Legal Anachronism* (1928) 3 Indiana L.J. 427, 429-432.

¹⁴¹ Atiyah, "Form and Substance in Contract Law" in his *Essays on Contract Law*, 1990, pp. 108-116.

France,¹⁴² it has been said in support of form that it determines the time in which the contract was formed, it enables the parties to be more precise, clear and ambiguous about the terms of the contract, especially where a notary is involved,¹⁴³ and provides proof of the existence of the contract, in the case where that is disputed. And in Ghana, the case has been made for legislative intervention (the imposition of formality included) in contracts as a means of protecting consumers.¹⁴⁴ No discussion on the subject of form is complete, however, without reference to that scholarly article by Fuller:¹⁴⁵ *Consideration and Form*. Although not immediately concerned with any particular statute on form, Fuller's essay raised the issue of "form" in relation to contracts. In such connection what was said, pertains to the issue that is involved in any discussion of statutes on form, namely, the relevance and importance of formal requirements with regard to contracts. Fuller suggested that formalities such as writing¹⁴⁶ serve three principal functions in regard to contractual obligations: an evidentiary, a cautionary and a channelling function. It now has to be seen whether the statutes on form in Cameroon satisfy these functions.

The first function seems to be obvious. It is to prove or establish (a) that there was a contract and (b) the nature, scope and extent of its terms. By requiring either notarization or registration and stamp duty for various contracts, the present statutes in Cameroon fulfil the evidentiary function in so far as there is the need to prove that there was a contract. But it cannot be said they always fulfil the need to establish the

¹⁴² See Ghestin, *Le Contrat: Formation*, para. 271.

¹⁴³ Weill & Terre, *Obligations*, para. 115.

¹⁴⁴ Date-Bah, "Legislative Control in Freedom of Contract" In: Ekow Daniels and Woodman (eds), *Essays in Ghanaian Law 1876-1976*, 1976 p. 118 et seq.

¹⁴⁵ Fuller, "Consideration and Form" (1941) 41 Col.L.R. 799. See also the interesting article by Perillo, "The Statute of Frauds in the Light of the Functions and Dysfunctions of Form" (1974) 43 Fordham L.R. 39 where the numerous functions he cites for the writing requirement seem to overpower the limited conclusions he reaches as to the prescribed content of the writing.

¹⁴⁶ As well as consideration, with which his essay was mostly concerned.

nature, scope and extent of its terms since even when contracts are reduced into writing, problems often arise with respect to understanding the precise meaning of what the parties have written or filling in gaps in what they have written by invoking some notion of "implied terms".

The second function suggested by Fuller, the cautionary function, is to serve to give a party pause, to oblige him to stop and think more seriously about the nature of the transaction into which he is entering or by which he is engaging himself in some burdensome, or potentially burdensome, way. This particular function has been utilized by the English Law Reform Committee 1937 with regard to the Statute of Frauds. As put by the Committee, "there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand".¹⁴⁷

Although there is something in this argument in Cameroon as well, I am inclined to caution that it should not be carried too far or taken too seriously. It may be true that Cameroonians who have to enter into a written contract take more care and pay more attention to what they are doing, but not necessarily. Every Cameroonian lawyer is surely familiar with the contracting party who signs without reading, only to find the true nature of his obligation later, if and when litigation is threatened. Sometimes the contract in issue is a "standard form" contract, a *contrat d'adhésion*. The mischiefs spawned by such contracts are now too well known,¹⁴⁸ even in Cameroon, thanks to a rare inquiry by a Cameroonian scholar,¹⁴⁹ to merit recounting here. Sometimes the contract is a specially made or bespoke contract, not confirming to a pattern. The contracting party may not have read it either because

¹⁴⁷ English Law Revision Committee, Sixth Interim Report *Statute of Frauds and the Doctrine of Consideration* (1937 Cmnd.5449), at 33. This was a minority view.

¹⁴⁸ See for e.g. Kessler, "Contracts of adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Col. L.R. 629; Sales, "Standard Form Contracts" (1953) 16 M.L.R. 318; Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 I.C.L.Q. 172; Von Mehren, "Battle of Forms: A Comparative View" (1990) 38 A.J.C.L.

¹⁴⁹ Dion-Ngute, *Standard Form Contracts in Cameroon*, Ph.D thesis, University of Warwick, 1981.

he was too lazy or disinclined to understand, or either because he was acting in reliance upon the word of the other party or his own recollection of what was said or what was intended. This problem is most certainly compounded by the inability of many people to read and write. And whatever the other reasons might be, they are many Cameroonians who do not take any more care about contracting because the contract is written or contained more or less in some written form than they do or would if the contract were merely oral. Too much emphasis, therefore, should not be given, in my view, to the importance of the "cautionary" function.

The third, or "channelling" function has been described as "that of denoting in and of itself that an undertaking is enforceable, that negotiations have ended, and that contractual intention is conclusively presumed".¹⁵⁰ Here, it must be said that the Land Tenure Ordinance 1974, for instance, which requires notarization, does fulfil this function. My field trip findings confirmed that Cameroonians generally consider the involvement of lawyers in their affairs as an indication of the seriousness and importance of such transactions. There is therefore a case for saying that the certification of a contract by a notary impresses very strongly on the parties the fact that they are contractually bound, not least because it sufficiently distinguishes a binding obligation from one that is not.

I have so far attempted to test the requirements of form in Cameroon against what is generally believed, thanks to Fuller, to be the three main functions of formal requirements in contract. However, it is doubtful whether the Cameroonian Parliament had these functions in mind when it introduced the various statutes on form considered above. So, before any conclusions are drawn I venture to suggest that the major motivation behind these enactments, especially the Registration Code 1973, was fiscal. In other words, they are what are known in France as "*les formalités fiscales*" requirements have been spread wide to encompass very many contracts, the whole exercise of registration of contracts must represent a valuable

¹⁵⁰ The Institute of Law Research and Reform of the University of Alberta, Background Paper No. 12 *The Statute of Frauds* (1978) p.18, cited in Fridman: *Op. cit.*, note 120.

source of revenue for the government.

My conclusion on the justification of formal requirements, viewed from the Fullerian perspective is that, to a certain extent there is undoubtedly a case in asking parties, particularly in relation to certain contracts, to ensure that their agreements are contained in some well-ordered, complete, identifiable and duly signed document. Many problems that can arise where a contract is in dispute may well be settled by reference to such writing. Fundamental issues such as certainty, intention to create legal relations, perhaps even mistake may be avoided by the existence of a written document. There is thus some validity in requiring that some contracts be formalised.

This validity is strongest in the case of contracts concerning land or an interest in land¹⁵¹ for which, it will be remembered, article 8(1) of the Land Tenure Ordinance 1974 requires notarization. The purchase of land or a house is of particular significance because for most Cameroonians, it is perhaps the most important and most expensive transaction of a lifetime. There are other very good reasons why contracts relating to land deserve special treatment. One is that such contracts are of a kind frequently entered into by laymen, not business people, and such laymen may need added protection. Another is the sentimental and economic considerations that are involved in the purchase and ownership of land. In most parts of Cameroon, to own land is a symbol of status and wealth. In farming and cattle rearing areas, to own land is an economic imperative.

This validity is also strong in the case of written contracts to which illiterates are parties.¹⁵² Where a contract has to be put in writing and one or some of the parties are illiterate or do not understand the language being used,¹⁵³ it is submitted that

¹⁵¹ But see Bridge, *Op. cit.*, note 120, who takes a contrary view. He argues against the writing requirement for sale of land contracts and advocates its repeal.

¹⁵² See generally Date-Bah, "*Illiterate Parties and Written Contracts*" (1971) 3 Rev. Ghana L. 181

¹⁵³ For the present purpose, it should be noted that there is a vast majority of Anglophone Cameroonians who are proficient in English but are completely unable to read and write or understand French. The reverse is even more true.

the law should protect such a party or parties by the imposition of some formal requirements. For this reason, the Illiterate Protection Ordinance (Common Law Cameroon) and the Arret No. 60/172 of 20 September 1960 (Civil Law Cameroon) are to be welcomed, even if they do not and cannot provide an impregnable protection. There is, for example, the difficulty of procuring a competent writer or a notary and interpreter in the remote villages. And the efficacy of the Illiterate Protection Ordinance depends on the availability of evidence showing whether the writer has or has not correctly recorded the instructions of the illiterate.

Also, contracts such as standard form contracts, whose nature is such that one party is in a weaker position, justify the imposition of some formal requirements. Formal requirements in such contracts should be used to protect weaker parties like consumers from the characteristic high-handedness of the usually more powerful parties who often draft such contracts. In France, for example, the use of form as a means of combatting the excesses of contracts of adhesion has gained momentum during the past two decades.¹⁵⁴ Yet, despite these compelling reasons for formality in contracts, there are certain aspects of it that must be called to question in Cameroon.

(3). CRITICISMS OF THE PRESENT LAW.

Once again, I am more directly concerned with local statutory provisions than with the Statute of Frauds. Which is not to suggest that the Statutes of Frauds itself is beyond reproach. In fact, it is significant to note that numerous commentators have criticised the Statute of Frauds on the grounds that the reasons advanced for its enactment have ceased to apply and that it fails to reflect actual business practices and serves as an instrument for, rather than a preventive of, fraud since it is invoked only

¹⁵⁴ For a discussion of the protection of consumers against contracts of adhesion in France, see generally Berlioz, *Le Contrats d'Adhesion*, 1976, paras. 150 et seq.; See also article 1 du decret du 24 mars 1978 which prohibits all clauses "*ayant pour objet ou pour effet de constater l'adhésion du non-professionnel ou consommateur à des stipulations contractuelles qui ne figurent pas sur l'écrit qu'il signe*".

to enable a party to renege on an oral deal which he was reasonably expected to honour.¹⁵⁵ Lord Wright once referred to it as "an extemporaneous excrescence on the common law".¹⁵⁶

Well, if the Statute of Frauds can be subjected to such severe criticisms, then, the present local formal requirements in Cameroon, which are not only more taxing but which make contracts that fail to comply with them void and unenforceable, should suffer even harsher criticisms. The law must also be criticised for being too formalistic by subjecting too many contracts to some kind of formal requirement. Another serious defect of these requirements is their failure to make allowance for other kinds of form such as those prescribed by native law and custom. It will be helpful at this stage to expand on these points.

(i) On their broad scope.

The categories of contracts for which either writing, registration or notarization is required seem to be infinite. Article 10 (4) of the Registration Code 1973, for example, is too generic. It provides for the compulsory registration of "synallagmatic agreements, in particular leases, sub-leases, transfers thereof, cancellations, subrogations, sales, exchanges, contracts, ... insurance contracts, etc". Then, there is the even more generic article 1341 of the Civil Code which provides, with the exception of commercial contracts,¹⁵⁷ that all transactions involving more than 500 francs must be evidenced in writing. This rule is phrased in terms which could easily be construed as an absolute, substantive requirement of writing: as to matters

¹⁵⁵ See for instance, Stevens, *"Ethics and the Statute of Frauds"* (1952) 37 L.Q.R. 355 ; Willis, *Op. cit.*, note 140, 540-542; English Law Revision Committee, Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration* 1937, Cmnd. 5449; and Fridman, *Op. cit.*, note 5, 47.

¹⁵⁶ Lord Wright, *"Williston on Contracts"* (1939) 55 L.Q.R. 189, 204-205.

¹⁵⁷ Article 109 of the *Code de Commerce* exempts commercial contracts from this requirement.

exceeding the sum of 500 francs, a writing "must be executed" (*Il doit être passé acte*).

If the above requirements were to be strictly complied with, it would mean that only the most trivial contracts are exempt from the demands of form. Yet, there appears to be little justification, under present day conditions, for the Civil Code's imposition of a formal requirement upon all non-business transactions involving more than a paltry 500 francs. The only justification, if it can be considered as such, for the imposition of the registration requirement upon all those contracts outlined in Article 10(4) of the Registration Code 1973, is the need to raise much needed government revenue.

It should be noted that in practice it is possible to water down the requirements of article 1341 with the help of articles 1347 and 1348 of the Civil Code. Article 1347 involves a very broad conception of the *commencement de preuve par écrit* (commencement of proof by writing) while article 1348 embraces the notion of moral impossibility, that is to say it would have been morally impossible, under the circumstances of the case, for the party to have obtained a writing. In France, the scope of article 1347 has been particularly expanded by the use of procedures made more effective by the law of 23 May 1942, which amended articles 324 to 336 of the *Code de Procedure Civil*, by which the court, either on its own motion or upon the request of one of the parties, can question the parties upon the subject matter of litigation. The answers given by a party in response to the questions put can represent an admission which will constitute a *commencement de preuve par écrit*. Moreover, if a party does not appear when summoned for such interrogation, or, upon appearance, does not answer the questions asked, the court can, pursuant to article 336 of the *Code de Procedure Civil*, consider this conduct as "equivalent to a beginning of proof by writing under the conditions of article 1347 of the Civil Code." It has since been suggested that as a consequence of this legislation, the formal requirement of article 1341 may eventually be virtually eliminated in

practice.¹⁵⁸

In Francophone Cameroon, it does appear as though little use has been made of articles 1347 and 1348 as a means of circumventing article 1341. I have found only one case, *La Collectivité Bakoko Adie v. Mbotte Martin*,¹⁵⁹ in which article 1348 was invoked in an attempt to defeat the requirement in article 1341, and even then this was unsuccessful. The facts of that case are not contained in the judgement but it would appear as though the action arose from an earlier criminal action against the respondent in which he had allegedly confessed or accepted the claim of the appellants. Building on that alleged confession, the appellants brought a civil action for damages against the respondent. The Court of Appeal was adamant that as the transaction which had led to the claim involved a sum over 500,000 francs, it should have been put into writing as required by article 1341. Since that was not the case, no amount of oral confession given at a criminal trial would suffice in the civil proceedings. The appellants were expected to produce written evidence to support their claim if it was to stand any chance of success. At this point the appellants argued that it was materially and morally impossible for them to procure any written proof of the transaction. Again the judgement does not state the facts on which the appellants based their argument of moral and material impossibility. In any case, the court rejected that argument and held that the claim for damages must fail since it was founded wholly on the respondent's alleged confession. This decision was affirmed by the Supreme Court, which agreed with the lower court that the contract should have complied with the writing requirement of article 1341. This decision seems harsh on the face of it. If, as the appellant's claimed, the respondent had confessed or accepted liability, albeit orally, at a criminal trial, there should be little justification for a civil court to refuse to act on such an admission solely on a technicality that the contract was lacking in form. On the other hand, may be the

¹⁵⁸ Hebraud, *Comment on the Law of May 23, 1942* (1943) D. Rec. Crit., Legislation 10, 11; see also Meurisse, *Op. cit.*, note 122.

¹⁵⁹ Arrêt No.163 du 38 Mars 1961, (1961) No.3, B.A.C.S (Cameroun Oriental).

Court of Appeal and the Supreme Court were not too sure about the genuineness of the admission or the circumstances under which it was extracted. Without full knowledge of the facts of this case, it is difficult to comment on it. The case is simply cited here to show that there has been an unsuccessful attempt to invoke the defence of moral impossibility to circumvent the effect of failure to comply with the writing requirement.

That much use is not made of articles 1347 and 1348 is, perhaps, explained by the fact that neither the parties nor the courts always insist on a strict compliance of article 1341. The 500 francs that the Cameroonian Civil Code actually mentions is ridiculously derisory and it is, indeed, not clear whether this sum relates to French Franc or Francs CFA. However, it is also possible to argue that even where a party can successfully circumvent article 1341, he could still fall foul of the requirement of the Registration Code 1973, which does not allow for any such exceptions.

When everything is considered, it still has to be said that the law in Cameroon, by bringing too many contracts into some kind of formal regime, is guilty of imposing formal requirements in transactions where little evidential and hardly any cautionary protection is needed.

(ii) On the Workability of Formal Requirements.

Accepting, as I do, that certain transactions are of sufficient importance to support the use of a form if a form is needed, the question must be asked whether the existence of this need should be determined only by writing or notarization or registration and stamp duty. The answer, it is submitted, must be in the negative. There really is little or no wisdom in excluding oral or other kinds of form known to customary law, in a country like Cameroon with so many illiterates and so many who are still governed by customary law, which is by nature, unwritten.

Fuller observed most poignantly that:

"The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the

situation out of which the transaction arises - including in these 'forces' the habits and conceptions of the transacting parties"¹⁶⁰

This effectively brings Cameroon's native law and customs into this discussion. Naturally, many Cameroonians still observe customary law. This means that they subject their activities, contracts included, to rules of customary law. With regard to formal requirements in contract, the point of departure between customary and modern contract law is writing. Being unwritten itself, customary law does not prescribe writing for any kind of contract recognised by it, including even contracts for the sale of land. Yet, the fact that those who adhere to customary law do not put their contracts in writing, never mind registering or notarizing them, does not imply that they do not take care when they enter into contracts or that they never comply with some kind of form that fulfils the so-called evidentiary, cautionary and channelling functions. Customary law, it needs hardly be said, is not destitute of form. It may not know of writing, but it maintains a considerable precision in oral tradition. The sale of land, for instance, must be approved by elders of the seller's lineage and must be concluded in the presence of witnesses for it to be valid. And as if that is not sufficient proof of the contract, it is also usually accompanied by elaborate formalities involving, for instance, the killing of a goat and/or the doing of some other ceremonial act, like the offering of libation. The same is true of contracts of marriage, contracts for the sale of livestock and many other important transactions. There is, in fact, a parallel between form under customary law and the Roman *stipulatio*,¹⁶¹ which compelled an oral spelling out of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders. It is therefore not proper for the law to categorise a transaction that has undergone such an elaborate form as void simply because it does not satisfy the kind of form prescribed by a statute which in any case may be alien to the parties.

Closely related to customary law is its shadow problem of illiteracy. Illiteracy

¹⁶⁰ Fuller, *Op. cit.*, note 145, p. 805. The emphasis are mine.

¹⁶¹ Fuller, *Op. cit.*, 145, 800.

remains widespread in Cameroon, in spite of the great advance in education in recent years. This widespread illiteracy is a social fact of which the law must take account. This the law does to the extent that it has imposed certain formal requirements aimed at protecting illiterate parties who enter into obligations contained in written contracts.¹⁶² I have already commended that. But my present concern is not about illiterates and written contracts. Rather, it is about the failure of statutory enactments to make allowance for all those who only enter into oral contracts because they cannot read or write. To treat as void for want of writing, registration or notarization, an oral agreement between illiterate parties, but whose existence is not in dispute, smacks of a punishment for illiteracy. Regrettably, that is the position that the law adopts presently. Despite the fact that writing is central to all statutory requirements on form, (if it is not expressly required, some written document is at least presupposed, as is the case with registration and notarization) none of the statutory provisions makes any exceptions for illiterates. Instead, the rules they lay down are absolute. Any failure to comply with them and the contract is void and unenforceable. Dr Elias once said about the requirement of writing,

"We feel that in our law, especially considering the prevalence of illiteracy in our country, the requirement of documents ...generally works hardship in many cases."¹⁶³

He was indeed referring to Nigeria but inserting Cameroon for Nigeria, the truth of his statement still holds.

Even when the parties have managed to reduce their contract into writing, it has still been treated as void because it was either not registered¹⁶⁴ or not certified by

¹⁶² See section 3 of the Illiterate Protection Ordinance 1958 (for Anglophone Cameroon) and article 21 du decret no. 60/172 du 20 sept. 1960 (for Francophone Cameroon).

¹⁶³ Nigerian House of Representative Debates on the Law Reform (Contracts) Bill, 23rd Nov. 1961, Col. 3341.

¹⁶⁴ See *Theresia Ewo v. Mary Sih*, supra, note 169.

a notary.¹⁶⁵ The requirement of notarization in particular becomes a little bit superfluous when one considers the fact that the country is not exactly "blessed" with an abundance of notaries or solicitors. How are parties who live in areas with no notaries, and there are many such areas, meant to comply with these requirements? If the law is to insist on form, it must also provide a system that can support it. Ihering has explained that the extreme formalism of Roman law was supportable in practice only because of the constant availability of legal advice, *gratis*.¹⁶⁶

(iii) On the Effect of Failure to Comply.

To urge parties towards some degree of formality, where it is needed, is not however the same thing as to require, as a matter of law, for the purposes of recognition and enforcement, that they indulge in such formality. It is bad enough to subject too many contracts to formality, to insist on formalities that invariably imply writing to the exclusion of other kinds of form known to native law and custom and to demand notarization, regardless of unavailability or scarcity of notaries in most parts of the country. But it is far worse to declare as null and void all contracts that fail to comply with such requirements. That is precisely what the Registration Code 1973 and the Land Tenure Ordinance 1974 prescribe. This can only make the law laughable at times. Let me elaborate.

Since no attempt has ever been made to discover what contractual practices Cameroonians actually follow regarding form in contracts, I decided to attempt to fill that gap during a field trip to Cameroon in 1992. To do so, I composed a questionnaire which was administered orally to no less than 200 Cameroonians. They included businessmen and non-businessmen, Anglophones and Francophones, village folks and urban dwellers, and illiterates and non-illiterates. I made the following findings.

¹⁶⁵ See *Nganga Ngassa Aloysius v. Alex Jabea Mbullah*, *infra*, note 170.

¹⁶⁶ See Fuller, *Op. cit.*, note 145, 802.

Of those who were literate, about seventy percent said they would reduce their contracts into writing if they considered it to be of much importance or if it involved a substantial amount of money. Asked to give examples of such contracts, all of them cited land related contracts (the sale or lease of land, the sale or lease of a house or the construction of a house) while some referred to private car sales.

While a good many businessmen try to put their contracts in writing, I discovered that they generally did so only when a substantial amount of money was involved or when they did not know the other party sufficiently well. Where the parties know each other, it is not uncommon to find instances where businessmen act on mere oral orders. *Denis Ndikum v. Miden*¹⁶⁷ is a very good example. In that case, the defendant, a development agency, placed an order for stationery and other office materials with the plaintiff. Nothing was written of the transaction. Even the price was not determined. When the plaintiff eventually supplied the order, a dispute arose as to how much he was to be paid. He asked for 2.4 million francs while the defendants claimed that the value of the supplies could not amount to more than 700.000 francs. The court eventually found for the plaintiff on account of the defendant's initial unchallenged acceptance of the goods.

Even more fascinating is *Ngang Peter Achutako v. Achoa Fon Bande*.¹⁶⁸ In that case the appellant sold a hotel to the respondent for the staggering sum of 125 million francs. Despite the colossal sum of money involved, and notwithstanding the fact that this sum was to be paid in tranches, the parties were prepared to invest each other with attributes of solvability and credibility to the extent that they concluded the contract orally. That this caused no surprise in the Court of Appeal for whom Inglis J. noted almost casually that "It must be pointed out that the agreement to sell the hotel and premises was never in writing. It was oral", is indicative of the fact that the courts must be used to such contracts. No further discussion of this case is needed here. It is cited, together with the *Miden* case above, only as an illustration

¹⁶⁷ HCB/6/85 (Bamenda, 10/6/1987, unreported).

¹⁶⁸ BCA/18/89 (Bamenda, 11/12/89, unreported).

of the extent to which contracting parties in Cameroon can place on the trust and word of each other without insisting on the need for any writing. And why not. This trust is hardly ever breached in the sense that the existence of the contract is hardly ever contested. In fact, in neither of the two cases was the existence of the contract denied by any of the parties, even in the heat of the disputes that eventually arose.

Interestingly enough, I discovered that some villagers and illiterates make a lot of effort to get their contracts written out for them. The vast majority, not surprisingly, do not. Even they, however, subject the contract so made to some kind of form which more than provides adequate proof of the existence and terms of the contract. This may mean the presence of many witnesses for both parties or some kind of ceremony or ritual.

Most tellingly, I discovered that even amongst those who put their contracts in writing, less than twenty percent actually follow it up with the requisite registration or notarization formalities. When I explained to them the legal consequence for failing to comply with any of these requirements, namely, that the contract would be null and void, not just unenforceable, they found that shocking. They could not understand, and rightly so, why a contract that has been reduced into writing and whose existence is not disputed by either party should be void simply because it has not been registered or notarized. But such is the law. And worse still, the courts have been known to apply it to the letter.

In *Theresia Ewo v. Mary Sih*,¹⁶⁹ the appellant contracted to buy a section of the respondent's premises in which she (appellant) already ran a restaurant. The sale agreement was put in writing. The contract price was 325.000 francs, of which 100.000 francs was paid instantly. It was agreed that if the balance was not fully paid by 31st December 1983 the property would revert to the respondent and the 100.000 francs advance payment refunded to the appellant. As late as June 1984, the appellant had not fully paid the contract price even though only 19.000 francs remained due. Despite the delay, the respondent still seemed prepared to receive this

¹⁶⁹ BCA/32/85 (Bamenda, unreported).

balance, when, as a result of a misunderstanding between the two, she (respondent) refused to accept the outstanding 19.000 francs and insisted instead on her contractual rights of rescission. According to the respondent, the appellant was in breach since she had failed to pay the full contract price before December 31, 1983. The respondent said she was prepared to refund to the appellant all that she had already received as part of the contract price, less 150.000 francs as damages for breach. The appellant for her part accused the respondent of breach and counter-claimed the sum of 210.000 francs as interest on all that she had paid to the respondent.

The trial court admitted the sale agreement in evidence and found for the respondent. On appeal, the appellant contended strongly that the trial court should never have given any legal effect to the sale contract because even though it was written, it was not registered in accordance with article 10(4) of the Registration Code 1973. Consequently, he argued, neither he nor the respondent was not bound by it. This argument found favour in the Bamenda Court of Appeal, which quashed the decision of the trial court, declaring that:

"Since the exhibit was, on the evidence, never registered, it was void and therefore unenforceable. We therefore agree with counsel for the appellant that the parties were not bound by it and that the learned trial Magistrate should never have admitted and given it legal effect."

The contract was thus treated as void and restitution ordered. So, unlike the trial court, the court of appeal was quite content to confine itself to the formal status of the contract, to the exclusion of all substantive issues.

In another case, *Nganga Ngassa Aloysius v. Alex Jabea Mbullah*,¹⁷⁰ the respondent sold his house to the appellant for 1.5 million francs. The parties themselves drew up the conveyance, i.e. without the use of a notary or solicitor. The respondent then continued to occupy the house long after the agreed date for his vacation of the premises. In an action by the appellant, the Buea Appeal Court of Appeal, upholding the Tiko Court of First Instance ruled that the contract was void and unenforceable. Inglis, J., summed it up this way:

¹⁷⁰ CASWP/10/85 (Buea, 17-07-1985, unreported).

"Now, there was no conveyance of the premises to the appellant, since the deed to establish transfer of real property right was not drawn up by a notary or solicitor. By virtue of Article 8 of Ordinance No.74/1 of 6th July, 1974 the transaction was null and void. It follows that no property was ever passed. The appellant had no real right in the property".

Once again, the court shunned any substantive consideration in favour of the formal status.

The Francophone courts too, encouraged by the Supreme Court, have been equally strict on their insistence on the compliance with formal requirements. In *Affair Bassama Pierre v. Essomba Jean*,¹⁷¹ the plaintiff who had been the defendant's tenant for several years, agreed to buy the property he was occupying, when the defendant, apparently due to financial difficulties, decided to sell it. The sale went through successfully, with the parties themselves drawing up a conveyance. Some years later, and with his finances in better shape, the defendant decided to cancel the sale, callously insisting that the contract had always been void and unenforceable because it had not been drawn up by a solicitor as required by *Loi No. 61-20 du 27 Juin 1961*. The Douala First Instance Court agreed with the defendant and ruled that the contract was void *ab initio*, a decision that was confirmed by the Douala Appeal Court. Understandably dissatisfied, the plaintiff continued to the Supreme Court, where the appeal was again rejected on the same ground of inadequate form:

"Attendu que le contrat de vente passé le 4 Mai 1970 étant nul et de nullité absolue parce que fait en violation de la loi no. 61-20 du 27 Juin 1961, le juge d'appel a, dans le but d'empêcher à l'une et l'autre parties contractantes de tirer profit de ce contrat frappe de nullité absolue, remis les parties au même et semblable état ou elles étaient avant la conclusion dudit contrat...."

The Supreme Court, like the lower courts, saw no need to go beyond the formal stage. The fact that the defendant had, out of his own free will, decided to sell his house, the fact that the parties had taken the extra measure of reducing the contract

¹⁷¹ Arrêt No. 15/CC du 13 Nov. 1986 (1990) No.1 Rev.Jur.Afr., 84 (Note François Anoukaha).

into writing, the fact that several years had elapsed before the defendant decided to get the contract nullified, were of no relevance. What was crucial was the lack of notarization.

Of course, as a matter of strict law, the decisions considered above are correct. Yet it is arguable that in cases where the contract is evidenced in writing, with neither party contesting its existence, and with no evidence of fraud, misrepresentation or duress, substantial and equitable considerations should take precedence over formal considerations. Atiyah¹⁷² draws a most apt analogy with marriage when he says:

"Just as in the case of marriage it is sometimes necessary to see how the parties have behaved, how long the relationship has lasted, and so on, rather than confine attention to the formal status itself, so also in the case of promise it is sometimes relevant to see why the contract was made, or what has actually happened following the making of the agreement".

Sadly, the courts remain unmoved by this enlightened approach, perhaps because they feel completely bound by statutory provisions, a fact that has not been helped by the Supreme Court's unbending stance on the issue. The cases reveal that the Supreme Court, more than the lower courts, champions the cause of formalism in contract.¹⁷³ In *Affaire Dikongue v. Bita*,¹⁷⁴ the Supreme Court even censured the Court of Appeal for accepting as valid a privately written contract for the sale of land. This, the Supreme Court emphasised, was in flagrant violation of the 1961 and 1974 laws imposing the requirement of registration and notarization on such contracts. The law still firmly maintains that the absence of the requisite formality prevents the plaintiff from having any claim against a defendant who is in blatant breach or who

¹⁷² Atiyah, *Op. cit.*, 141, p. 112.

¹⁷³ See *Aff. Elessa v. Tonnang Francois*, CS Arrêt du 4 Juin 1981 (1981) 22 & 23 Cam.L.R. 199; *Aff. Mme Mballa v. Bollo*, Arrêt no. 25/CC/ du Octobre 1982 (unreported); *Aff. Tecto v. M. Ossongo*, Arrêt no. 66/CC du 19 Nov. 1981 (unreported); *Aff. Mme Ngakam v. Mba Jeanne*, Arrêt no. 72/CC du 22 Avril 1982 (unreported). In all these cases the Supreme Court refused to treat the contracts as valid for the simple reason that they were lacking in one form or the other.

¹⁷⁴ C.S. Arrêt no. 42/CC du 24 Janv. 1991 (1991) no.7 Jur. Info., 38.

has chosen to ignore a serious bargain deliberately made.

Possibly the most serious criticism of statutory enactments on form in Cameroon is that, by allowing parties to ride free of contracts and break their promises, they may actually create fraud, in the sense of injustice caused by meretricious conduct. This criticism is brought into its sharpest focus when it is appreciated that a party can freely admit in court that he entered into what both parties believed to be a binding contract, but state that nevertheless he now wishes to take advantage of what can only be described as a legal technicality. In fact, in many cases the defence of lack of form has been pleaded as an after thought in preference to a defence that was less easy and therefore less convenient. This state of the law offers little to enthuse about. So, what ought to be done.

(4). WHAT IS TO BE DONE WITH THE LAWS ON FORMALITY?

In response to the picture of the law presented above, the following main possibilities exist. First, formal requirements ought to be retained but they must be reserved only for relatively important contracts such as those relating to land or involving large sums of money. It has already been conceded that in land related contracts, for instance, form serves not only the evidentiary function, but also a valuable cautionary function since it compels care to be taken when entering what for many people is the most significant contract in their lives. The present law which imposes formal requirements on too many contracts needs to be replaced with one that seeks to preserve a proportion between means and end; it is, indeed, laughable to require writing for contracts involving a derisory 500 francs and equally preposterous to expect villagers, for instance, with no access to lawyers to notarize their contracts.

The second way of improving the present law even without the aid of a statute, would be for the courts to accept other kinds of form in contracts. I am here referring to native law and custom which also subjects certain contracts to various kinds of formal requirements. Just because these do not involve writing, registration

or notarization, should not make them any less valid and enforceable. Form under customary law is always more than sufficient in fulfilling the same functions as writing, registration and certification by notary. It should follow that these statutory prescriptions should not apply to all contracts entered into pursuant to native law and customs.

Finally, and most importantly, the content of the present laws on form, notably article 10 of the Registration Code 1973 (on registration and stamp duty) and article 8 of the Land Tenure Ordinance 1974 (on notarization) must be diminished and simplified¹⁷⁵ so that a memorandum would be sufficient if it indicated merely the existence of the contract. At present, a memorandum or even a carefully written document does not suffice for the purpose of validity and enforceability in the absence of registration and notarization. It is hereby suggested that as long as the existence of the contract is proven by simple writing or some other means, the absence of registration or certification by notary should not be fatal to the validity of the contract. At worst, enforceability, not validity, could be linked to the full compliance with these requirements so that the contract only becomes enforceable when the statutory requirements are fulfilled. In other words, the required formality will not have to be executed contemporaneously with the negotiations leading to either the oral or privately written agreement. Where the defendant does not contest the existence of the contract, the courts should be given the power to order the plaintiff or both parties to comply with the necessary requirements before the continuation of litigation. Since these formal requirements largely perform a fiscal role, i.e. raising income for the government, there is no reason why this cannot be done.

There is also a host of other measures which the courts can be encouraged to employ to give effect to certain contracts that may not have strictly complied with formal requirements. The equitable doctrines of estoppel and part performance can

¹⁷⁵ It has been suggested that the recent multiplication of formal contracts in France has been made possible by the simplification of the required formalities. See Guerriero: *L'acte juridique solennel*, th. Toulouse, 1975, L.G.D.J., p.352.

be particularly useful in this respect. In fact, in *Theresia Ewo v. Mary Sih*,¹⁷⁶ counsel for the appellant submitted that since the contract had been substantially performed by the appellant by the payment of 306.000 francs out of the agreed amount of 325.000 francs, the respondent could not in equity rescind the contract. This submission was rejected by the court of appeal which felt that an order for specific performance of the purported contract would be tantamount to giving legal effect to a contract that had already been declared void and unenforceable *ab initio* for want of form. However, even if the court had been persuaded to go beyond the formal stage and consider the substantive arguments relating to part performance, they still possibly would have rejected it on the strength of the decision in *Maddison v. Alderson*,¹⁷⁷ in which Lord Selbourne said:

"It may be taken as now settled that part payment of purchase money is not enough; and judges of high authority have said the same even of payment in full".¹⁷⁸

At this point, it has to be admitted that in the case of contracts for the sale of an interest in land, (like the *Theresia Ewo* case), the equitable doctrine of part performance has always suffered from uncertainty as to its doctrinal justification, with the consequence that the decision of the House of Lords in *Steadman v. Steadman*¹⁷⁹ has thrown the law into a state of disarray. In that case, the House of Lords held that the payment of respective sums of money were sufficient acts of part performance to render the contract enforceable. Amidst divergencies of opinion, the one proposition that seems clearly established is negative, viz, it can no longer be stated that the mere payment of money is never a sufficient act of part performance. It should be said that technically, *Maddison v. Alderson* and not

¹⁷⁶ Supra, note 169.

¹⁷⁷ (1883) 8 App Cas 467.

¹⁷⁸ *Ibid* at 479.

¹⁷⁹ [1976] AC 536, [1974] 2 All ER 977; Wade, "Part Performance: Back to Square One" 90 LQR 433; Emery, "Part Performance - No Judicial Development After All" (1974) CLJ 205.

Steadman v. Steadman, applies in Cameroon. This is because the former is a pre-1900 decision and therefore binding while the former is post 1900 and at most only persuasive. But whatever position the Cameroonian courts choose to follow, it is proposed that a number of non-statutory exceptions, such as estoppel and part performance be created or expanded so as to render some statutory requirements a bit nugatory. It may also be suggested that in future the courts should have the power to dispense with any formal requirements in the interests of justice. Such dispensation need not take the absolute form of contract or no-contract, but could assume the shape of monetary compensation for the injurious reliance falling short of full contract entitlement.¹⁸⁰

If these proposals are thought in any way to be radical, may it be pointed that some of them have actually been given judicial expression in some decided cases. In *Andreas E. Lobe v. Jonas Houtchou*,¹⁸¹ plaintiff and defendant entered into a written agreement by which the former conveyed his plot to the latter for the sum of 300.000 francs. The parties later cancelled this agreement in writing because the plot was too small for the defendant but entered into a new contract by which plaintiff was to provide a larger plot for 1.300.000 francs. A deposit of 300.000 francs was paid for which a receipt was issued. It was stated on this receipt that a formal agreement would be drawn up on payment by the defendant of the balance. Before that was done, a dispute arose, with the plaintiff claiming that the defendant was in

¹⁸⁰ For example, Section 139 of the American Restatement Second on Contracts (American Institute 1979) provides for a remedy in the event of action or forbearance under a contract unenforceable for want of compliance with the Statute of Frauds. Such action or forbearance must be causally linked to the defendant's promise and should have been reasonably expected by the defendant. The remedy is "limited as justice requires" in accordance with a number of criteria laid down. Section 129 provides for specific performance of a sale of land contract where this is necessary to avoid injustice and the plaintiff has acted in "reasonable reliance" on the contract, the term "reliance" being preferred to "part performance" as more accurately descriptive of certain acts, such as taking possession and making renovations, that came within the part performance doctrine.

¹⁸¹ HCK/29/87 (kumba, unreported).

breach by refusing to pay the outstanding balance. The defendant did not deny that he had not completed the payment but contended that he was actually owing less than what the plaintiff was claiming. Then, sensing an easy escape route out of the contractual mire, counsel for the defendant submitted that the purported sale of land by the plaintiff was void for lack of form as it had not been notarized in accordance with article 8 (1) of the Land Tenure Ordinance 1974. Ignoring strict law and invoking equity, Epuli, J. retorted:

"Equity looks on that as done which ought to be done. The purported sales of land were not made by conveyance, that is by deed, but by simple agreement reduced into writing. It is to be presumed that the sales would later on be perfected by proper conveyances".

He accordingly refused to hold that the contract was void. To have done so would have been tantamount to endorsing the defendant's blatant contempt for a contract he not only freely entered into but had actually started to perform.

Another case in which the absence of form was not fatal to the validity and enforceability of the contract was *Sama Ploma v. Seidu Ngula et al.*¹⁸² The facts were very complicated but it is enough to say that it involved the sale of cattle. The plaintiff claimed to have bought a total of 10 cows and 7 calves from defendants through various sales contracts. He was suing the defendants for breach (non-delivery) or specific performance in the alternative. There was evidence, in the form of a receipt (exhibit C), to suggest that he had actually paid for 5 cows but no such other evidence to support his claim for the other sales. The trial judge rejected the receipt and dismissed all his claims.

On appeal, the Bamenda Appeal Court had this to say about the rejection of exhibit C:

"Although the learned trial judge rejected Exhibit 'C' ... we find that the rejection was not because the document was not genuine. It was because it was not stamp dutied. But the trial judge had the alternative of asking that the stamp duty requirement be fulfilled for the document to be admitted in evidence in order that justice should be done. We therefore rely on the document and hold that the 1st and 2nd

¹⁸² BCA/10/83 (Bamenda, 21/3/1984, unreported).

respondents sold 5 cows to the appellant ..."¹⁸³

Since there was no other evidence, written or otherwise, of the other sales the appellant was alleging, that part of the claim was rightfully dismissed by the Appeal Court. Once again, the court allowed common sense, equity and justice to triumph over strict law.

Even the Francophone courts which I have already accused of paying too much respect to formal requirements, have not always been inclined to limit all issues to the formal status of a contract. They occasionally employ the doctrine of good faith,¹⁸⁴ courtesy of article 555 of the Civil Code, to give effect to contracts relating to land which do not satisfy the requisite form. Article 555 is couched in verbose language but briefly, it states that where A occupies or develops land that belongs to B, B as the rightful owner has a right to demolish any such development without paying any indemnity to A, and if A is deemed to have occupied or constructed on the land in bad faith, he may even have to bear the costs of any work carried out by B.¹⁸⁵ If, however, A is considered to be a good faith occupier, he may not be evicted, and if so, he will be entitled to compensation to the tune of his investment.

In *Affaire Njinou Jean & Emassi Therese v. Siewe Casimir*,¹⁸⁶ the doctrine of good faith was applied to give effect to a contract that was lacking in the requisite form. The plaintiffs had sold a piece of land to the defendant by a privately written agreement in 1969. In 1982, they brought an action for an eviction order against the defendant. The Bafang High Court granted the eviction order on the rather unconvincing ground that the defendant was a bad faith occupier. Overturning this decision, the Douala Court of Appeal, while acknowledging that the contract of sale

¹⁸³ Emphasis are mine.

¹⁸⁴ It is trite law that the doctrine of good faith is not recognised in common law Cameroon, the reason being that it has never been part of the English law.

¹⁸⁵ This has been reiterated by articles 2 and 3 of Law no. 82-22 du 14 Juillet 1980 relating to bad faith occupiers.

¹⁸⁶ C.S arret no.3/CC du 18 janv. 1990 (1992) no.10 Jur. Info 49.

in 1969 could be considered a nullity because it was never notarized, nevertheless went on to hold that since

"Siewe n'était entré en possession et en jouissance du lot litigieux qu'en vertu des actes préalablement signés par les intimés",

he had to be treated as a good faith occupier in the sense of article 555 of the Civil Code. The contract was therefore allowed to stand. This time the plaintiffs appealed. The Supreme Court totally agreed with the reasoning of the court of appeal and dismissed the appeal.

These cases reveal that the courts on both sides of the legal divide are aware of the dangers of always confining themselves to the formal status of contracts. They show that the courts are sometimes prepared, for the sake of justice, to give priority to other considerations. Unfortunately, those cases in which the courts have adopted such a bold and commendable approach are very few and may even be considered as aberrations in the sense that they do not actually represent the actual position of the law. The evidence of all the other cases on the subject suggests that the courts still insist on the complete execution of formal requirements at the time of conclusion of the contract or at the latest, before commencement of any action. Anything short of that and the contract is void. This, it has been argued, can sometimes result in injustice as it virtually allows the defendant to admit an honest obligation which the plaintiff was entitled to, and may have, in fact, relied upon and yet defeat its enforcement by pleading that the agreement did not comply with the prescribed form. The law must therefore move away from such a Procrustean approach. In its place it should adopt a more flexible approach that will allow the courts the possibility to weigh up the reasons in favour of recognizing and enforcing the contract and balance them against the lack of formality.

Since this is one area of contract law that is dominated by statute law, it will take legislative intervention to bring about changes. But before that is done, it will be incumbent on the courts to show greater awareness to the factual and legal problems that have been created by formality in contracts. The Bamenda Court of Appeal has pointed the way forward by stating that, in the absence of form, the trial judge has

the alternative of asking that the requirement be fulfilled even after the commencement of action, in order that justice should be done.¹⁸⁷ In Cameroon, commercial life in general and contracts in particular are nowadays hedged in by so many petty statutory regulations, that it would scarcely promote the interests of justice to drive a plaintiff from the seat of judgement merely because he has committed a minor transgression.

B. ILLEGALITY.

It is a settled rule both of English and French law that a contract which is illegal, contrary to public policy or *ordre public*, or immoral, is void, or at least will not be enforced. This rule may appear simple and clear enough yet its application has posed problems for the courts in both systems.¹⁸⁸ The courts have not always been consistent in their application of rules on illegality. No attempt will be made here to reconcile the rules, neither is necessary to provide an encyclopedic account on the law of illegality. The aim here is to find out how the courts in Cameroon cope with the problems of illegality and the solutions they arrive at. This entails ascertaining what type of contracts are illegal and the effect or consequence of that illegality.

¹⁸⁷ In the *Sama Ploma* case, *supra*, note 182.

¹⁸⁸ Szladits, "Illegality of Prohibited Contracts: Comparative Aspects" In: **XXth Century Comparative and Conflict Law: Legal Essays in Honor of Hessel E. Yntema**, 1961, p. 221; Barland, "Comparative Law: Common and Civil Law: Illegal and Immoral Contracts" (1954) Wis. L.R. 146.

(1). TYPES OF ILLEGALITY.

Under the **common law**, illegal contracts are variously classified. This classification may be based on the nature of the objectionable conduct¹⁸⁹ or on the source of the rule infringed.¹⁹⁰ Doubts have been cast on claims that these classifications may facilitate a generalisation of the effect of illegality¹⁹¹ but the other *raison d'être* of these classifications - that they are purely expository - seems more convincing.

As if to lend support to Williston's statement that "There seems to be no importance to these classifications",¹⁹² the courts in Cameroon have never really bothered to draw on them. For ease of exposition though, I will make use of the typical English law classification, which divides unlawful or illegal contracts into those which are prohibited by statute, those illegal in the common law, and those contrary to public policy. But because contracts contrary to the common law and those against public policy overlap, I shall treat them together. This means that I will consider contracts prohibited by statute and contracts illegal at common law on grounds of public policy.

(a). Contracts Prohibited by Statute.

English law takes a hard line on statutory prohibitions. A contract that is expressly or impliedly prohibited is illegal and void. In Cameroon, statutes in this

¹⁸⁹ For e.g. Pollock, **Principles of the Law of Contract** (13th ed.) chap. 8, p. 261, divides cases into those in which the contract is contrary to (i) positive law, (ii) good morals and (iii) public policy.

¹⁹⁰ Here a contract that violates a statute is more likely to receive less or no support from the court than one that violates a rule of the common law.

¹⁹¹ Treitel, p. 325.

¹⁹² Williston, **Contracts** (rev. ed.), s. 1628.

connection should not be confined to legislation enacted by the National Assembly (Parliament) but should include orders, decrees and ordinances by Mayors, Prefects, Governors, Ministers and the President, and any other persons empowered by the National Assembly to make them. Because there are numerous such statutes in Cameroon, it will be difficult, and unnecessary, to enumerate and discuss all of them. Only a few important ones are mentioned here.

Some of these statutes have already been considered above in relation to formal requirements in contract. These include (i) the Land Tenure Ordinance 1974 (article 8 (1)), which declares that the failure to notarize deeds establishing, transferring and extinguishing property renders the contract null and void; (ii) the Registration, Stamp Duty and Trusteeship Code 1973, which imposes a requirement of registration on certain contracts; and (iii) the Illiterate Protection Ordinance, which guarantees some protection for illiterates not just in contractual matters but in whatever dealings that involve writing. These need no further elaboration here except perhaps to say that there are important in the present discussion because they declare that any contracts that fail to comply with them are illegal or void. A very important statute not yet mentioned at all is the Money Lenders Ordinance.¹⁹³ This requires all money lenders to be licensed, so that any transaction involving an unlicensed money lender is illegal. Some decisions of the courts on the failure to comply with these statutes will be considered below under the effects of illegality.

(b). Contracts Illegal at Common Law on Grounds of Public Policy.

Some contracts are by their nature harmful to the general interests of society, and for that reason the courts have traditionally refused to sanction or give effect to them. Such contracts, which may be contrary to good morals or may be against accepted customs or laws of the land, are conveniently referred to as contracts against public policy.

¹⁹³ This is contained in Cap. 124 of the Laws of the Federation of Nigeria 1958 but it still applies in Cameroon by virtue of her earlier association with Nigeria.

Public policy as a concept cannot be stated in any simple proposition.¹⁹⁴ It has been described as "a very unruly horse",¹⁹⁵ and as being "so broad as to be hopeless".¹⁹⁶ It follows that the number or type of contracts that can be labelled as violating public policy is by no means standard. Some commonly identifiable ones in England¹⁹⁷ include: contracts to commit a crime, sexually immoral contracts, contracts that prejudice the administration of justice, contracts that corrupt public life, and contracts to defraud the revenue.

In Common Law Cameroon, there is no reason to suggest that the courts will be more welcoming to any of the above contracts. That they will be treated as being against public policy is borne out by the following two decisions. The first one, *Stephen Doh v. The People*,¹⁹⁸ involved a contract to commit a crime. The appellant had been arraigned before the Muyuka Court of First Instance charged with attempted counterfeiting. The appellant had managed to extract the sum of 274.000 francs from one Ateba with a promise that the sum would be "doubled". Perhaps this facts need a bit more explaining. It is not an uncommon practice in Cameroon to find impostors, holding out to be counterfeiterers, who prey on unsuspecting victims with claims that they will literally double any amount of money handed to them. The truth about these impostors, known locally as "money doublers", is that they never do what they promise. Instead they abscond with any sums of money handed to them, as was the case in the instance case. Ateba, receiving neither the promised "doubled" amount nor his original outlay, was forced to complain to the Police who arrested and charged the appellant accordingly. The appellant was found guilty and was given a

¹⁹⁴ For some observations on the doctrine, see generally Lloyd, **Public Policy: A Comparative Study in English and French Law**, 1953; Shand, *Unblikering the Unruly Horse: Public Policy in the Law of Contract* 1972 C.L.J. 144.

¹⁹⁵ In *Richardson v. Mellish* (1824) 2 Bing 229, 252, *per* Burrough J.

¹⁹⁶ Treitel, p.324.

¹⁹⁷ Cheshire, Fifoot, and Furmston, p. 359.

¹⁹⁸ Criminal Appeal No. CASWP/18/C/78 (Buea, unreported).

five year prison sentence. The trial Magistrate also ordered the appellant to refund the money collected i.e. 274.000 francs to Ateba, the complainant. He appealed.

The Court of Appeal upheld the prison sentence but took a different view on the trial Magistrate's order that the complainant was entitled to a refund of the money from the accused. There was unchallenged evidence before the court that the complainant had entered into a contract with the accused solely for the purpose of "doubling" money. This was in the form of a written contract, signed by all parties involved. On that evidence, the Appeal Court was quick to point out that such a contract could not effectively be enforced in any court of law because of its illegality and therefore it "would be against public policy if this court should lend support to such agreements". In the result, the order by the trial court for the refund of the 274.000 francs was set aside.

The second case, *Lt. Joseph Sonkey v. Ignatius Oputa*¹⁹⁹ involved defrauding the inland revenue. The appellant, an army lieutenant, ordered building materials from the respondent. As this was to be purchased from neighbouring Nigeria, the appellant instructed the respondent that on arriving in Cameroon with the goods, he should deposit them with a friend at a place called Man O' War Bay (where there is an army barracks), and that if Customs checks prevented the goods from being taken there, the respondent should "drop them on the way" from where he (the appellant) would arrange for collection. The respondent could not take the goods to Man O' War Bay for fear of Customs, so he deposited them at a place called Debunscha. The appellant then arranged for a friend to collect the goods only for him to discover on arrival that some of it had been stolen. As a result, the appellant brought an action for breach of contract and lost at first instance.

His appeal was no more successful as the Court of Appeal saw no reason to alter the decision of the lower court. Mbuagbaw J. summed up the feeling of the court by pointing out that by drawing up a scheme to avoid the Customs,

"The parties clearly intended to defraud the government of the payment of import duties on the goods. ... The appellant was certainly

¹⁹⁹ CASWP/28/80 (Buea, 17-02-1981, unreported).

in delicto since he knew the vital fact that would make the performance of the contract illegal. In our view, therefore, public policy does constrain us to refuse our aid to the appellant and he is not entitled to succeed."

In **Civil Law Cameroon**, the sphere of illegal contracts is established by the following provisions of the Civil Code:

Article 6 which states that laws relating to public order and morals cannot be derogated from by private agreement.

Article 1108 which lists *lawful cause* as one of the four conditions for the validity of a contract.

Article 1131 which declares an obligation with no *cause* or with an *unlawful cause* to be of no effect.

Article 1133 which states that a cause is illicit when it is prohibited by law, when it is contrary to good morals or to public good.

So, as in France, unlawful contracts in Francophone Cameroon may conveniently be classified into three groups: those prohibited by *la loi*, those contrary to *bonnes mœurs* and those contrary to *ordre public*. These groups are not entirely exclusive of each other as sometimes contracts prohibited by law and those contrary to *ordre public* overlap. In order to distinguish between the various classes of unlawful contracts, French courts have generally tended to treat as contracts prohibited by law only those that are expressly forbidden by statute, while those that are impliedly prohibited or those that offend against some other law are treated as contracts against public policy. Another distinction is then drawn between, on the one hand, contracts prohibited by law and contracts against public order (illegal contracts proper) and, on the other hand, contracts contrary to good morals (immoral contracts). Contracts contrary to *bonnes mœurs* suffer from lack of precise formulation in France and even less so in Civil Law Cameroon. In the context of Civil Law Cameroon, therefore, I shall split the discussion into two sections: contracts prohibited by statute and contracts contrary to public order (to which immoral contracts may conveniently be subsumed).

(c). Contracts Prohibited by *la loi*.

The Land Tenure Ordinance 1974, and the Registration, Stamps Duty and Trusteeship Code 1973 mentioned above in connection to Common Law Cameroon also apply to Civil Law Cameroon, therefore, all contracts that fail to comply with them must fall under this heading. To these must be added those statutory provisions that apply only to Civil Law Cameroon, such as *Décret No. 60/172 du 20 Sept. 1960*, article 21 of which requires the intervention of a notary and an interpreter in all transactions involving a party who does not understand the French language and *Décret-Loi du 9 Janv. 1963*, of which article 5 states that only land that has been properly registered can be the subject of any sale, effectively forbidding the sale of all unregistered land. It must also be noted that all the prohibitions relating to *unlawful cause* derive from the Civil Code and are therefore statutory.

Cause as a necessary ingredient for the formation of contracts has already been considered.²⁰⁰ Yet, even where there is *cause*, the contract will be of no effect if that *cause* is unlawful. Article 1131 of the Civil Code also says when a *cause* is unlawful. This is so wide ranging that it may be possible to explain the illegality of almost any contract in terms of unlawful *cause*. For instance, it has been used by the Supreme Court in *Affair Fotso Mbobda Jean v. Epeti Ekedî Eugénie & Ekedî Alice*²⁰¹ to explain its refusal to enforce a contract of sale of unregistered land, such contracts having been expressly prohibited by *la loi*, in this case article 5 of the Law of 9 January 1963. The Supreme Court also used it in *C. Jaques v. W. Simon*²⁰² against a contract of loan with an extortionate interest rate. In that case the usurious monthly interest rate of 35% was in breach of the Decree of 22 September 1935, forbidding usury.

²⁰⁰ See Chapter 6 above.

²⁰¹ C.S. Arrêt du 16 Février 1978 (1978) Nos. 15 & 16 Rev. Cam. Dr. 241, 244.

²⁰² C.S. Arrêt no. 37/CC du Mars 1973 (1976) No.9 Cam. L.R. 62.

(d). Contracts contrary to *Ordre Public*.

The textual basis for the concept of *ordre public* is provided by articles 6 and 1131 of the Civil Code. While *ordre public* may be similar to the common law concept of public policy in some respects, it is not always the equivalent. *Ordre public*, for instance, has a much wider scope of application than public policy in the common law.²⁰³ It is used in the civil law both as a general standard within which the courts have a limited judicial discretion to impugn transactions held to offend public order, and also as applied to specific statutory enactments which are imperative in the sense that they cannot be excluded by agreement.²⁰⁴

Ordre public, like public policy, is hard to define. It has been said that if public policy can be likened to an "unruly horse" (*cheval rétif*), then, *ordre public* has to be likened to "*sables mouvants*"²⁰⁵ (literally, moving sand). Some French commentators consider the common law concept of public policy to be more coherent than *ordre public*,²⁰⁶ but one must doubt if common lawyers accept that public policy is at all coherent, in view of the problems it continues to pose.

In France a distinction is sometimes drawn between *ordre public textuel* and *ordre public virtuel*.²⁰⁷ The former refers to enacted *ordre public*, as in article 6 while the latter refers to unenacted *ordre public*, or one deriving from illicit *cause*. This distinction carries little significance, not just because French courts rarely rely on

²⁰³ See generally Tallon, *Considérations sur la notion d'ordre public dans les contrats en droit français et en droit anglais*, Melanges Savatier, 1965, 884.

²⁰⁴ See generally Lloyd, *op. cit.*, note 194; Malaurie: *L'ordre public et le contrat, étude de droit civil comparé France, Angleterre, U.S.S.R.*, thèse, Paris, 1951.

²⁰⁵ Rapport PILON, Req., 21 avril 1931, S. 1931.1.377.

²⁰⁶ Tallon, *Op. cit.*, note 203, p.884.

²⁰⁷ Carbonnier para. 32; Ghestin, para. 100.

ordre public virtuel,²⁰⁸ but because the French *Cour de Cassation* had long ago ruled that it is sufficient that the contract is contrary to *ordre public*, even if only on the grounds of illicit *cause*, without there being any need for it to be forbidden by *la loi*.²⁰⁹

Another distinction, a more current one, that is used to differentiate between article 6 and article 1133 is that which divides *ordre public* into *ordre public économique et social* and *ordre public politique et moral*.²¹⁰ The former comprises the ever-widening field of state intervention, direction and protection in the interest of the economic balance of the state and the welfare of the community. This involvement of the state in contracts, which runs against the spirit of freedom of contract is known as *dirigisme* in France.²¹¹ Examples include legislation on consumer contracts, rent restrictions, insurance etc. Under the *ordre public politique et moral* on the other hand, the courts may consider as unlawful those contracts that offend against, or tend to pose a threat to, basic constitutional principles of the state, the family and the individual. *Ordre Public* in this sense is more or less analogous to instances of public policy at common law, though applied over a wider range.

It is difficult to say whether the courts in civil law Cameroon make any use of these distinctions.²¹² There is as yet no evidence of any point being made of the difference between political and economic public order. This may be due to the fact there appears to be no instances of illegality based on what is termed *ordre public politique* before the courts. This is rather surprising, considering the ever worsening

²⁰⁸ See Hauser, "*Ordre Public*" *Encyclopaedie Dalloz (Civil)* (2nd edn) vol V, s. 13.

²⁰⁹ Cass. civ. 4.12.1929, note Esmein, S 1931.1.49, Kahn-Freund, *Sourcebook*, p. 253.

²¹⁰ Carbonnier para. 32; Ghestin, para. 113 ff.

²¹¹ See Ghestin, para. 118 ff.

²¹² In France the significance of this distinction lies in the fact that the courts seem to apply the doctrine of public order more leniently against violations in the economic than in the political sphere. See Szladits, *Op. Cit.*, note 188, p. 224.

problem of corruption in public life and the mindless disregard for established convention. In fact, the paucity of litigation in this area should not by any means be taken as an indication that contracts that offend against *ordre public politique* are rarely entered into by Cameroonians. If anything, the lack of litigation is indicative of an acquiescence, perhaps not by the courts, but by the public, of the decline, if not the word decay, in the standard expected of public life.

So far, those cases in which the courts have invoked *ordre public* to attack and strike down the legality of the contract involve statutory prohibitions and can therefore be classed under *ordre public économique*. A couple of illustrations will suffice here. In *Affair Mbobda v. Epeti Ekeddi & Ekeddi Alice*,²¹³ the contract was void for illicit cause, but the court also added that the contract was *nulle et d'une nullité d'ordre public*. In *Affair C.C.E.G. v. E.T. M.*,²¹⁴ the parties entered into a contract of lease for 5 years but failed to notarize it. The Supreme Court declared the contract *nulle et d'une nullité d'ordre public* because article 1 of the Law of 27 June 1961 expressly requires all leases for over 3 years to be notarized.

(2). The Consequences of Illegality.

Under the common law, if the contract is expressly prohibited by statute, it is illegal and void, irrespective of the intention of the legislator.²¹⁵ A good example of an express statutory provision in Common Law Cameroon is the Moneylenders Ordinance 1958 which requires moneylenders to be licensed. In *Ngwa George Neba v. Ngwa Martin*,²¹⁶ it was held that the plaintiff could not enforce his claim for debt due and owing after the court discovered that he had been engaged in the business of

²¹³ *Supra*, note 201.

²¹⁴ C.S. Arrêt No. 26/CC du 12 janv. 1971 (1976) No. 9 Rev. Cam. Dr., 59.

²¹⁵ Williams, "Legal Aspects of Illegal Contracts" (1942) 8 C.L.J. 51-69; *Cope v. Rowlands*, (1836) 2 M & W 149, p. 351.

²¹⁶ HCB/37/87 (Bamenda, 17-4-1989, unreported).

moneylending at exorbitant interest rates without the requisite licence. A similar decision was arrived at by the Bamenda Court of Appeal in *Anji George v. Chefor Andreas*.²¹⁷

Where the contract is illegal by nature, no action can be brought, directly or otherwise, to enforce it. This is based on the maxim "*ex turpi causa non oritur actio*". Thus a party will be unable to recover by claiming damages or compensation for breach of contract. This explains why in *Lt. Sonkey v. Oputa*,²¹⁸ the plaintiff could not succeed in his action for breach of contract. That case is also authority for the proposition that a contract that is *ex facie* legal will not receive the backing of the courts if it can only be performed by illegality or is intended to be performed illegally. Since the parties intended, and indeed succeeded, in bringing the goods into the country without paying Customs duty, the court said that "the law will not help the plaintiff in any way that is a direct or indirect enforcement of the rights under the contract".

Where the object of the contract is illegal, the whole transaction is tainted with illegality and no right of action exists in respect of anything arising out of the transaction. The maxim *in pari delicto potior est conditio defendentis* applies in this case and no restitution can be claimed. Thus in *Stephen Doh v. The People*,²¹⁹ where the object of the contract was to "double" money (i.e. produce counterfeit notes), the money that the appellant had received in pursuit of that contract was held by the Court of Appeal, overruling the trial court, to be irrecoverable, notwithstanding the fact that a criminal conviction and prison sentence had already been entered against the appellant for the offence of attempted counterfeiting. In denying recovery, the logic behind the reasoning of the Appeal Court was unassailable. What if there had been no criminal action, would a civil action against the appellant for the recovery of the sum have succeeded?, the court inquired.

²¹⁷ BCA/52/91 (Bamenda, unreported).

²¹⁸ *Supra*, note 199.

²¹⁹ *Supra*, note 198.

Certainly not, they answered. Then, echoing the maxim *ignorantia juris haud excusat*, the court stressed that the party who made the payment ought to have known that such a contract was illegal and that if he did not, he would still be prevented from recovering by the above maxim. To further buttress their decision the court cited with approval the following statement of Wilmot, C.J. in *Collins v. Blanton*:²²⁰

"Whoever is a party to an illegal contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to receive it back."

It is clear from the above cases that the common law courts in Cameroon take a very uncompromising line on contracts whose illegality is highly reprehensible.

But the rule under English law that a party cannot recover what he has given under an illegal contract is only a general rule and as such it allows for some exceptions. First, where the parties are not in *pari delicto*, the less guilty party may be able to recover property that he has transferred under the contract. Secondly, where the contract is still executory, a party is allowed *locus poenitentiae* and may recover both money and property, provided that he starts proceedings before the illegal purpose has been substantially performed.²²¹ Further still, a party can recover if he does not have to rely on the illegality in substantiating his claim.²²² The first two exceptions are self-explanatory but the third needs further elaboration.

The rule under the third exception has again been given judicial expression by the House of Lords in the very recent decision in *Tinsley v. Milligan*.²²³ Under that rule a plaintiff can recover if he can frame a cause of action entirely independent of

²²⁰ (1767) 2 Wils KB 341 at 350.

²²¹ This exception has been interpreted rather restrictively by English courts, e.g., in *Bigos v. Bousted* [1951] 1 All E.R. 92.

²²² Cheshire, Fifoot, and Furmston, p. 380; Treitel, p. 441.

²²³ [1994] 1 A.C. 340.

the contract, so that he is not compelled to disclose the illegality. This rule, established as it is, both in judicial practice²²⁴ and academic writing, has not always met with approval.²²⁵ Following the *Tinsley v. Milligan* decision, it has been argued and demonstrated by way of examples that, contrary to judicial dicta, a party actually does recover property or money transferred under an illegal contract "if he can establish his right or title to it by relying on the contract or its illegality".²²⁶ In other words, the party recovers not by avoiding the illegality, but by effectively relying on it. The logic behind that assertion - for instance, that if the transferee's right derives from an illegal contract, he cannot establish it without relying on that contract - appears to me to be strong enough, yet the validity of the rule that recovery is based on the non-reliance of the contract or its illegality remains firmly embedded in English law, as *Tinsley v. Milligan* itself confirms. In any event, from a Cameroonian perspective, whether an action for recovery succeeds because of the avoidance of, or by the reliance on, the illegality is of no great import. What does matter is whether recovery is ever allowed on an illegal contract at all.

This matter came up for consideration before the Bamenda Court of Appeal in *Toh John Calvin v. Nyanunga Gideon Fokumla*.²²⁷ In that case the appellant brought an action for breach of contract, debt and detinue against the respondent. The appellant's case was that he bought a piece of land from the respondent for 800.000 francs. That sum was to be paid in instalments. He claimed that after paying a total of 500.000 francs, he went ahead with preparations for the development of the said piece of land by building a water tank, planting cypress trees and transferring sun dried bricks to the site for construction. He then gave the respondent a cheque for

²²⁴ See *Amar Singh v. Kulubya* [1964] A.C 142 (Criticised by Cornish, "Relying on Illegality" (1964) 27 MLR 225) and *Bowmakers Ltd v. Barnet Instruments Ltd.* [1945] K.B. 65.

²²⁵ E.g. Cornish, *op. cit.*, note 224.

²²⁶ Enonchong, "Title Claims and Illegal Transactions" (1995) 111 L.Q.R. 135, 136.

²²⁷ BCA/16/87 (1991) 5 Jur. Info., 55.

300.000 francs in final payment but to his surprise, the respondent returned the cheque, accusing him of breach and cancelling the contract.

The respondent for his part agreed that the appellant had paid 500.000 francs but pointed out that he had failed to make the final payment on the agreed date of 4th October 1985. He further complained that the cheque for 300.000 francs which the appellant issued as late as 13th February, 1986 was post-dated, to be cashed one month later. That as a result of the appellant's failure to complete payment, plus the fact that the appellant had taken advantage of his absence to start unauthorized development of the land, he was prompted to cancel the agreement. The respondent then accused the appellant of breach and counter-claimed expenses which he claimed he incurred in providing entertainment for those who were called on three occasions to witness the finalization of the sale.²²⁸ On those three occasions the appellant had failed to show up. The question then was whether the court would enforce the contract or put the parties back to their *status quo ante*, mindful of the fact that the contract was void since it had not complied with article 8 (1) 2 of the Land Tenure Ordinance 1974 which requires notarization for all contracts for the sale of land.

At first instance, counsel for the plaintiff (appellant), not surprisingly, preferred to ignore the formal irregularity and argued instead that the payment of 500.000 francs was tantamount to substantial performance, so that the only remedy available to the defendant, was an action for the balance. Responding, counsel for the defendant (respondent) said that as a matter of strict law, the plaintiff would have no case before a court of law since according to the Land Tenure Ordinance 1974, the contract itself was null and void. But he added, a touch patronisingly, that he was not going to press that advantage. Instead he argued that the failure to complete payment on the agreed date meant that consideration for the contract had not been completely furnished, that the delay in the completion in payment amounted to a breach and that for these reasons, ownership in the land never passed to the plaintiff.

²²⁸ I have already explained elsewhere that important sales transaction are usually accompanied with some entertainment (food and drink). Those involved are meant to be witnesses, not just of the sale but as to its terms too.

The trial judge also sidestepped the issue of lack of form and declared himself satisfied that there was a contract, the breach of which was attributable to the plaintiff. He proceeded to make the following orders: that the defendant repay the plaintiff's 500.000 francs, and that the plaintiff should quit the defendant's land, taking with him his blocks and building materials. One would have thought that this was a fair judgement but the plaintiff thought otherwise and appealed.

The Bamenda Court of Appeal immediately addressed the question of illegality. The court was satisfied that this was an illegal contract so that the real question was one of recovery of money paid or property transferred under an illegal contract. The court recited the circumstances under which recovery was possible at common law, namely: where the parties are not in *pari delicto*, where the illegal purpose has not been substantially carried out, and where the action is founded on a right independent of the contract or the party does not rely on the illegality. As the Court of Appeal saw it, this case fell under the third exception. This is evidenced by the following statement by the court:

"From the pleadings and evidence adduced it would appear that the substance of the appellant's claim was founded independently of the contract and also he did not rely on his illegal transaction to make out his claim."

In the result the appeal was allowed with the respondent being ordered to pay 500.000 francs for debt due and owing, plus special damages and costs to the tune of 800.000 francs.

The principle on which the Court of Appeal judgement is founded is plain and well established, yet it is submitted that its application to the facts of this case is most unconvincing. If, as the court categorically stated from the outset, this was an illegal contract, then, one fails to see how the appellant could have substantiated his claim without relying on the contract or its illegality. With no disrespect to the court, there is nothing in the facts or pleadings to support the view that there was no reliance on the contract. If anything, this judgement only lends credence to the argument that a transferee actually succeeds by relying on, and not by avoiding, the illegality. This is not to suggest, however, that the result the court arrived at was wrong. The result

seems clearly desirable, it is the reasoning that is strained. It is hereby suggested that it was possible for the court could to employ more convincing reasoning to arrive at the same result. This could have been done in one of two ways. The one would have been to predicate the judgement on the doctrine of consideration. That is to say, by failing to complete payment on the agreed date, there was a failure of consideration on the part of the appellant. The other reason is even more convincing, and it would have required the court to say that the contract was null and void. That is only applying the Land Ordinance 1974 itself, which expressly declares such contracts null and void. And if the contract is void, it has to be treated as though it never existed, with the consequence that the parties are restored to their *status quo ante*. Any of these two methods would have led the court to the same conclusion but without any dubious explanation.

The final consequence under the common law to be considered here is that a contract cannot be enforced where the whole or part of the consideration is illegal. If, however, the illegal consideration merely constitutes a subsidiary or minor part of the total consideration, and if the illegality is not *contra bonos mores*, the illegal part of the consideration may be severed from the rest of the consideration and the legal promises enforced. In *Samuel Atanga v. Martin Etta*,²²⁹ the plaintiff sued the defendant for the balance of the cost price of an engine saw he had sold to a certain Cyprian Agbor, for whom the defendant had stood surety. At the time of bringing the action, only 63.000 francs of a total of 190.000 francs was owing. It was a term of the agreement that the defendant would be charged an extra 5.000 francs per month for failing to pay any instalment. The trial Magistrate held, *inter alia*, that the penalty clause was illegal and on that count, dismissed the action for non-suit. The Appeal Court agreed with the trial court on the illegality of the penalty clause:

"The penalty clause in the contract is in terrorem of the respondent. The sum payable as a penalty is not only greater than the sum owing but is in addition to it. It is therefore unconscionable and illegal".

²²⁹ CASWP/22/80

But the Court of Appeal did not consider this illegality enough to warrant a refusal of enforcement of the contract. So while no effect was given to the penalty clause, the appellant was held to be entitled to the outstanding balance, plus general damages of 20.000 francs

In **Civil Law Cameroon**, the consequence of an illegal contract, whether the illegality derives from the violation of a statute or from an offence against public order, is that it is void and has no legal effect. It suffers from *nullité d'ordre public*. The consequences of illegality in Civil Law Cameroon are generally the same as in France. This is perfectly demonstrated by the Supreme Court judgement in *Affair C.C.E.G v. E.T.M.*,²³⁰ where it was said,

"Mais attendu que sont nuls de plein droit toutes les actes qu'une disposition legale declare nul, que toute personne interessee est autorisee à se prevaloir d'une telle nullité, laquelle n'est susceptible d'être couverte ni par une confirmation ou ratification ni par la prescription".

That is to say that when a contract suffers from *nullité d'ordre public*, the nullity can be asserted by anyone who has a justified interest in doing so; the contract cannot be subsequently ratified and is not subject to any limitation of action. This statement of the Supreme Court is a succinct summary of the effect of illegality at civil law. The court felt it necessary to stress the impossibility of ratification because of the appellants' contention that, since they had, in fact, deposited the contract documents with a notary, the contract was thereby authenticated. Dismissing that argument, the court first of all explained that the mere deposition of documents with a notary by the appellant alone does not suffice because, for there to be any subsequent confirmation by notarization, both parties have to be present, and then concluded resolutely that *"toute confirmation est impossible en matière de nullité absolue"*.

That there can be no ratification in the case of absolute nullity²³¹ was again

²³⁰ *Supra*, note 214.

²³¹ Under the civil law, the ineffectiveness of legal transactions is of two kinds: absolute nullity (*nullité absolue*) and relative nullity or voidability (*annulabilité*).

underlined in *Affaire Tchuenta v. Société Camerounaise d'Expansion Economique (SCEE)*.²³² As in the earlier case, the contract had not been notarized as required by *loi no. 61/20 du 27 Juin 1961*. The Supreme Court held that there could be no ratification because the text itself does not allow for the possibility of regularization of the non-compliance. The rule against ratification is not without its critics in Cameroon. It has been considered as "regrettable", and capable of causing blackmail.²³³

Because a contract afflicted with *nullité d'ordre public* is void and has no effect, it follows that each of the parties is under a duty to restore to the other what he received as a total or partial performance of the contract. In *Affair Fotso Mbobda v. Epeti Eked*²³⁴ where the contract was void because it involved the sale of unregistered land, the defendants offered to refund the 75.000 francs which the appellant had paid as deposit and the Court of Appeal ordered the appellant to accept it. However, on appeal to the Supreme Court, the appellant insisted that there had been an express agreement by both sides that in the event that the sale was not completed, article 1590 of the Civil Code will apply. Article 1590 provides that where a promise to sell is made with deposits, either party may withdraw. If such withdrawal is at the instance of the buyer, he forfeits the deposit and if it is at instance of the seller, he restores two-fold what he received. The appellant was saying in effect that since it was the respondents who called off the sale, they should have been ordered to pay him double the 75.000 francs he had paid as deposit. The Supreme Court rejected that argument on the ground that article 1590 could not be given effect because the contract was void for illegality. The contract was therefore of no effect, so that the appellant was entitled to no more than he had given as

²³² C.S. Arret no. 18/CC du 4 Déc. 1986, (1991) no. 6 Juridis Info, 61

²³³ J.H. Robert, *Le Droit des Société Commerciales de l'ex-Cameroun Oriental*, éd. CLE, p. 43, cited by Nyama, *Revue de Jurisprudence*, (1991) no.6 Info Juridis, p.62.

²³⁴ *Supra*, note 201.

deposit.

This right of restitution, however, may be barred by the application of the maxim *nemo auditur propriam turpitudinem allegans*. This maxim is not found in the Code and has no other textual basis; it has been shaped and developed by the *jurisprudence* and *doctrine*. Its application in French law has not always been certain.²³⁵ A distinction is drawn between illicit and immoral contracts. French courts are generally more inclined to enforce an action for restitution where the contract is illicit only, without being immoral.²³⁶ This distinction is, however, not always followed and some commentators maintain that the courts grant or refuse restitution according to what they see best.²³⁷

It is not clear how established, if at all, this distinction between illicit and immoral contract for the purpose of restitution, is in Civil Law Cameroon but the following two decisions appear to reflect that distinction. First, in *Affaire C.C.E.G v. E. T.*,²³⁸ the Supreme Court affirmed the decision of the Court of Appeal to order restitution despite the protestations of the appellant that the maxim *nemo auditur* precluded that. In declaring the contract of lease illegal, the Court of Appeal had said,

"...si la nullité a pour effet de remettre les choses dans l'état ou elles se trouvaient avant la formation du contrat il n'empêche que le contrat annulé a reçu execution pendant près sept ans; que pour empêcher un enrichissement de l'une ou l'autre des parties, la jouissance et l'usage de l'immeuble doivent être rémunérés par la C.C.E.G, l'indemnité due pour le travaux effectués dans l'immeuble par C.C.E.G. doit être payée par E.T".

The court effectively took notice of the fact that the contract, despite being void, had

²³⁵ The recent tendency seems to be against the maxim and in favour of restitution. See Sabbath, *Denial of Restitution in Unlawful Transactions-A Study in Comparative Law* (1959) 8 I.C.L.Q. 486, 491 et seq.

²³⁶ See Aix, March 28, 1945, [1946] *Semaine Juridique* II. 3063.

²³⁷ 7 Planiol & Ripert (ed. Esmein), paras. 748 et seq.

²³⁸ *Supra*, note 214.

actually been performed for seven years. Under such circumstances, to bring the lease to an end as if nothing had happened would hardly have put the parties in their pre-contractual position. So, to put them in that position, the court had to ensure that whatever was owing was paid up even if that meant giving some effect to the contract. Although both the Court of Appeal and the Supreme Court did not say so in their judgements, one suspects that, in objecting to restitution, the appellants (the tenants) were merely attempting to use the maxim *nemo auditur* as a cloak for their shameless attempt to avoid paying accrued rents. Again, without wanting to impute on the Supreme Court a reasoning that it did not expressly adopt, it is submitted that the court, if it was so minded, could have explained the rejection of the application of the maxim *nemo auditur* in this case by the fact that the contract was only illicit, not immoral.

The maxim *nemo auditur* was successfully invoked in a recent case, *Affaire Olama v. Société Camerounaise de Banques (S.C.B.)*.²³⁹ The plaintiff, a career Magistrate, was a customer of the defendant bank (S.C.B.). His monthly salary was paid by direct transfer from the Treasury to his bank account. For a certain period the plaintiff's account was credited with more money than he was due. Of course the bank was not to know whether this was an error since all it normally did was receive the monthly payments. This new, overcredited amount was confirmed on the plaintiff's statement of account. On discovering this error the Treasury ordered the bank to immediately repay the excess but that was not before the plaintiff had made use of the money. However, the bank did repay the excess to the Treasury and then proceeded to recoup it from the plaintiff's subsequent monthly payments. The plaintiff argued that the bank could not do so, accused them of high-handedness and sued for breach of contract and fraud, demanding the refund of the money the bank had already recouped plus damages. For their part the bank simply argued that they were entitled to do as they did and that to order restitution in favour of the plaintiff would be tantamount to allowing him to benefit from his own turpitude.

²³⁹ Jugement Civile No. 297 du 10 Avril 1991, (T.G.I., Yaounde, unreported)

The court agreed with the bank's argument and dismissed the action. One may wonder what turpitude the bank was referring to. One may only assume that by failing to notify the Treasury that he was being overpaid, the plaintiff was himself guilty of, at best carelessness, at worst fraud. In other words, the plaintiff had cheated on the Treasury. If this interpretation is correct, then the plaintiff could not expect to enlist the help of the law in his bid for the recovery of sums to which he was not entitled to have received in the first place. Once again, in applying *nemo auditur* to deny restitution the court did not make use of the illicit/immoral contract distinction. Yet, had it been imperative to do so, the court could have said that the plaintiff's dishonest or fraudulent conduct was *contra bonos mores*, especially coming as it did from a Magistrate. It must be stressed that this attempt to explain the granting of restitution in the first case and the refusal of it in the second case is entirely mine. At no point did any court refer to them. So, perhaps the argument raised by some commentators in France that the courts simply do what they deem best is even more true in Civil Law Cameroon.

In France the courts are less than strict on contracts violating provisions in the economic spheres. They seem prepared to modify the strict effects of illegality in such contracts. This can be seen in the loose interpretation given to a certain Law of November 16, 1940 which provided that for "transfers of real property *inter vivos* to be valid ... must have been authorized by the *préfet*".²⁴⁰ According to this law, any contract violating this provision was declared void and was not to be subject to ratification by subsequent authorization. That notwithstanding, the courts refused to declare such contracts void and maintained that only the act of transfer (*mutation*) was forbidden; the underlying contract was held valid and later authorization made the contract fully binding, preventing withdrawal by the vendor.²⁴¹

Cameroonian courts have not adopted this soft approach on similar contracts. They seem content to stick to the letter of the law by invoking the full rigour of

²⁴⁰ Law of Nov. 16, 1940, art. 1: "... doivent être autorisées par le préfet."

²⁴¹ Cass. civ. Janv. 15, 1946, D. 1946, 341, note Hébraud.

illegality on such contracts. This is all very glaring from the strict interpretation given to a similar provision to the French one considered above. In the case of French Cameroon, a similar law, *Décret du 26 Dec. 1944* provided that all leases of real property for over a period of three years required the prior authorization of the Governor. Contracts that failed to satisfy this condition were declared void and not subject to ratification or limitation of action. In *Société La Libamba v. Kouoh Dikwamba Paul*,²⁴² the parties, in 1953 entered into a contract whereby the respondent leased land to the appellant for a period of 15 years. As this arrangement had been concluded without the requisite authorization of the Governor, the Supreme Court held that the lease was void. It did not matter that it had been running for almost ten years. The court said it was crucial that the contract had not complied with the necessary requirements. Ruling out any possibility of ratification, the court said that ratification implies that the act to be ratified at least has a certain legal existence, something that could not be said of the lease in question, which was a complete nullity because of its failure to observe the decree of 26 Dec. 1944.

It can be said from the above that Cameroonian civil law courts are tougher on void contracts than their French counterparts. It is submitted that the French modified stance, particularly towards contracts that only violate some statutory provisions, is the better one. It would be preferable for Cameroonian courts (of both systems) to distinguish, for the purpose of the effect of illegality, between contracts that are illegal because they are immoral or offend against public order so blatantly, and those that are illegal simply because the law says so. Contracts in the latter category are, strictly speaking, not illegal but void. Examples of such contracts include those that fail to comply with the requirements of Stamp Duty and Registration, notarization, or those that fail to obtain the requisite administrative approval. The illegality in these contracts only stems from the failure by the parties to observe some statutory requirement. Such contracts are not prohibited by those statutes and cannot be considered as violating any established moral conventions. In

²⁴² C.S. Arrêt no. 7 du 21 Dec. 1965, (1965) no. 13 B.A.C.S.C.O.

such circumstances, there should be no reason why in the absence of some other compelling reason, the contract should not be ratified by authorization or be allowed to be registered or notarized. The decision in *St John Shipping Corp. v. Joseph Rank Ltd*,²⁴³ though coming from England, is instructive in this regard throughout Cameroon. In that case, a shipowner committed a statutory offence by overloading his ship while performing a number of contracts for the carriage of goods. Devlin J. held that he was still entitled to freight, because the object of the statute was to prevent overloading and not to prohibit contracts. The same can be said of several of those over zealous statutes in Cameroon. When they are violated, as it often happens, the courts should give the parties every chance to redeem the contract, either by imposing a fine and/or making an order that they should regularize the contract so that it complies with the necessary statutory prescription or both.

²⁴³ [1957] 1 Q.B. 267.

CHAPTER 8

REMEDIES FOR BREACH OF CONTRACT.

Assuming that the necessary requirements¹ for the formation of a contract have been satisfied and that the contract is not tainted by any defects,² the next logical step is for that contract to be discharged. There are three main possibilities for the discharge of contracts. The first, and natural one, is for the parties to execute or perform their respective obligations under the contract. The second is by breach.³ That is, one of the parties refuses or fails to perform or adequately perform his own part of the obligations. The third possibility is that the contract is frustrated. Only discharge by breach will be considered in this present exercise. It goes without saying that breach of contract is a very important topic, since an overwhelming majority of contract cases arise out of breach or alleged breach.

Breach of contract seems to have two principal sides to it: what is breach, and what are the consequences that flow from it. In this chapter, I propose to say very little about the first question, which might require a discussion as to whether the contracting party undertakes only to use reasonable care to try to achieve a result, or whether he undertakes absolute liability to secure a result. The common law, unlike the civil law, takes the latter as its starting point: liability is, in the absence of other indications, strict (subject only to the doctrine of frustration). Since liability is not strict under the civil law, it being linked to fault,⁴ the question as to what is breach is the natural starting point at civil law. Be that as it may, my concern here is with

¹ Offer, Acceptance and Consideration or *Cause*. (see chapters 5 and 6).

² See chapter 7.

³ Reynolds, "*Discharge by Breach as a Remedy*" In: Finn, ed., *Essays in Contract Law*, 1987, p.183.

⁴ See generally, Constantinesco: *Inexécution et Faute Contractuelle en Droit Comparé (Droit Français, Allemand, Anglais)*, 1960.

what happens when there is a breach. So, all I propose to say here about the question as to what is breach is that a breach of contract is established by proof that a party to the contract has either failed to perform a contractual obligation in accordance with the standard of duty applicable to the obligation within the time stipulated for performance of the obligation, or he has committed an anticipatory breach.⁵

My emphasis is therefore firmly on remedies for breach of contract. For present purposes, it is assumed that there is an effective contract, that one party has failed to perform his undertaking and that there is no lawful excuse for this failure. The precise remedy of any breach of contract must depend on the particular circumstances of the case. Nevertheless, it is not easy to specify the notion of remedy, as English legal writing does not seem to provide any universal delimitation. Some authors do not use the expression, remedy for breach,⁶ while others allow it to encompass restitution⁷ and limitations⁸ but not termination for breach.⁹ It will be shown below that there is hardly any greater consistency used in French law to describe the remedies for breach of contract. However, following the examples of many distinguished writers under both systems,¹⁰ I shall deal with what is generally recognized as the three main remedies for breach: substitutionary relief or damages;

⁵ Carter: **Breach of Contract**, 2nd edn., 1991, para. 102.

⁶ Atiyah did not use it in his **Introduction to the Law of Contract**, 3rd edn., 1981, but uses it the 4th edn. of 1991, chapter 22.

⁷ Treitel, **The Law of Contract**, 8th edn. 1991. (Henceforth referred to simply as Treitel)

⁸ Chitty on **Contracts**, 26th edn., 1988, vol. i, **General Principles**, Part 7, chapter 28.

⁹ Atiyah, *Op. cit.*, note 6, 4th edn., treats termination and rescission separately (chapter XX1) from remedies (chapter XX11).

¹⁰ To mention only a few, Carter, *Op. Cit.*, note 5, para. 104; Treitel: **Remedies For Breach of Contract - A Comparative Account**, 1991, para. 1 (hereinafter referred to as Treitel, **Remedies**); Carbonnier, **Droit Civil - Les Obligations**, 12th edn., 1985, para. 70, and Nicholas: **French Contract Law**, 1982, p. 204 (hereinafter referred to as Nicholas).

specific relief and termination (including for this purpose refusal to perform). I will exclude questions relating to exemption clauses, agreed damages, and penalty clauses, in order to limit this study to those remedies available to a plaintiff or a creditor¹¹ conclusively to bring to an end the situation resulting from a breach for which the debtor is responsible.

To preface the discussion, it is perhaps useful to briefly point out some differences in treatment and arrangement between the two systems. Whereas English law treats remedies for breach of contract as a topic in its own right, French law subsumes it amongst aspects of the effect of contracts or obligations.¹² Since the effect of a contract in civil law is to create an obligation, and the effect of an obligation is either that it be performed, whether voluntary or under legal compulsion, or that a substitute for performance is provided by way of damages, it is perhaps not illogical to treat remedies under the heading of the effect of obligations. Yet the exposition in the Cameroonian Civil Code - like the French Code - in which most of the texts relating to the issue are to be found in Chapter III (the effects of obligations arising under Title III - contracts and consensual obligations in general); while some appear under the rubric 'the obligation to perform an action or to abstain from performing an action' (section III, articles 1142-5); and others still under 'damages resulting from breach of an obligation' (section IV, articles 1146-53), is in itself disconcerting. And if all that is not disconcerting enough, in Chapter IV ('Different types of obligations') there is to be found article 1184, which deals with judicial rescission and also the creditor's option as between specific performance and rescission.

In the face of this confusing arrangement in the Code, one is driven to refer to legal writing in search of clarity. This has to be French legal writing which is still

¹¹ The terms 'creditor' and 'debtor' when in reference to the civil law, will be used in the French sense, i.e. the individuals who benefit from, or are subject to, an obligation of any kind, not only an obligation for the payment of money. It will roughly correspond to the plaintiff and defendant, though not invariably.

¹² Arts. 1134-1167. Enforcement is covered by arts. 1142-1145 while damages for *inexécution* are covered by arts. 1146-1155.

very much used in Civil Law Cameroon. Here too, it is noticed that the exposition of contemporary French authors is no more illuminating than that of the Code, since as regards remedies there is some disagreement as to the nature of contractual liability. Those who espouse a general theory of civil liability have analysed under that head tortious and contractual damages, specific performance, and judicial rescission as the termination of the obligations¹³ or the effect of contracts.¹⁴ Carbonnier treats damages and rescission under breach of contract but discusses specific performance under the general regime of obligations, entitled "*Le Pouvoir de Contrainte*" (literally, the power of compulsion).¹⁵ It is perhaps only Stark who concentrates his analysis on remedies under the heading 'sanctions for the breach of contractual obligation'.¹⁶ It is not necessary to go into the reasons for this diversity in approach as that does not bear on the content of the remedies that are to be considered here.

It is necessary, however, to say that although the difference in the external approach between the common and the civil law as highlighted above is more a matter of arrangement than of practical significance, it nevertheless reflects another important difference of approach between the two systems. Under the common law the starting point is the award of damages, specific performance being an exception. Put another way, the choice seems to be between damages and specific performance. Under the civil law, the primary remedy is specific performance. In terms of choice, it is between specific performance and rescission. This is mirrored in the contrasts between the common law's emphasis on remedies and the civil law's emphasis on

¹³ H. L. and J. Mazeaud, *Leçons de Droit Civil*, Book II, vol. i, 8th edn., 1991, (ed F. Chabas) hereinafter cited simply as Mazeaud/Chabas, *Leçons*; See also Viney, *Traité de Droit Civil, La Responsabilité, i: Conditions*, 1982.

¹⁴ Marty/Raynaud, *Droit Civil*, Book II, vol. i: *Les Obligations*, 1962.

¹⁵ Carbonnier, 1^{re} Partie, chapter VII; For a similar layout, see Weill and Terré, *Droit Civil, Les Obligations*, 4th edn., 1986.

¹⁶ Stark, *Droit Civil : Les Obligations*, 2nd edn., 1986, (eds. Henri Roland and Laurent Boyer).

rights and duties. For ease of convenience of treatment, I shall take out those portions of the effect of contracts which relate to inexecution or remedies from their natural habitat in the traditional civil law arrangement, and place them in this chapter on remedies. That leaves me with a simple arrangement in which I will treat the three main remedies outlined above. No attempt will be made to provide an exhaustive treatment of the various remedies. I propose instead to look at how Cameroonian courts interpret those important general principles governing these remedies.

1. DAMAGES.

In line with the common law tradition, an action in damages is the basic relief for breach in Common Law Cameroon. This is well established but by way of example, it was reiterated by the Bamenda Court of Appeal in *Mukoro S. Tembi v. Texaco Cameroon*,¹⁷ where a prayer for specific performance was met with the response that the fundamental rule is that specific performance will not be ordered if there is an adequate remedy in law. The insinuation being that the proper remedy was an action for damages, which was awarded to the plaintiff as a matter of course.

Although the civil law gives priority to the remedy of enforcement, it will be noticed, at any rate in Civil Law Cameroon, that the remedy of an action in damages plays a much more important role in practice than theory is prepared to accept. And the well established common law proposition that any breach of contract gives rise to a right to claim damages is also shared by Civil Law Cameroon for which article 1149 of the Civil Code provides that compensation should be given for all loss (*dommage, préjudice*) resulting from non-performance.

There is a considerable body of law on damages under both systems¹⁸ but it is

¹⁷ BCA/47/84 (Bamenda, 13/05/1985, unreported).

¹⁸ For a comparative account, see Treitel, *Remedies*, ss. 40-142; For the common law, see the absorbing and pioneering study Washington, "*Damages in Contract at Common Law*" (1931) 47 L.Q.R. 345; "*Idem Part 2*" (1932) 48 L.Q.R. 90; see also

neither imperative nor feasible to cover every strand of principle governing damages here. The discussion will focus on the basic principles. Before that is done, two interesting observations need to be made. The first is that in the law on damages (and remedies in general) Common Law and Civil law Cameroon follow English and French law very closely, perhaps more so than in the other areas considered thus far in this work. The second is that the basic principles governing damages are common to both the common and the civil law.

By and large, the principles form a coherent whole. The three main ones which shall be considered below are as follows. First, is the principle that damages are compensatory. Second, is the principle that the interests most generally protected is that which the plaintiff has in the contract. And finally, there is recognition by the law that the plaintiff's right to claim damages must be subject to some limitations.

(I). The Compensatory Nature of Damages.

Whether at common law¹⁹ or civil law,²⁰ the purpose of the award of damages is to compensate the plaintiff for a loss which he has suffered as a result of the non-performance of the contract. There are many corollaries to the compensatory principle but only two will be considered here. The first one is the general rule that damages are based on loss to the plaintiff and not on the gain to the defendant. As Sir Robert Megarry put it in *Tito v. Waddell (No. 2)*,²¹

"The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff."

Much concern has been raised, more by commentators than by the courts, that

McGregor, *McGregor on Damages*, 1988.

¹⁹ Treitel, p. 825.

²⁰ Nicholas, p.219.

²¹ [1977] Ch. 105, 332; see also, *Teacher v. Calder* (1899) 1 F. (H.L.) 39.

such a principle may not on all occasions be sufficient. It has been suggested that there is a substantial case for applying, in suitable circumstances, a measure based on the extent by which the defendant has benefited from the breach²² and there is now evidence to suggest that the courts have been taking heed to these suggestions.²³

There is also some judicial authority in Common Law Cameroon for the proposition that the courts will not always ignore the defendant's gain in their assessment of damages. In *Zebulon Koshi Munshwa & Martin Ngwa Banduh v. Ngwaniba S. Njofor*,²⁴ the respondent, in breach of a car loan agreement with the appellants, seized the car and put it to use as a taxi. It was held by the Bamenda Court of Appeal that the second appellant (to whom ownership had passed) was entitled to recover all sums (found as a fact to have been 6.000 francs a day) that the plaintiff had made as a result of his breach. It should be stressed that decisions like this are the exceptions, not the rule. The courts still generally concentrate on the plaintiff's loss. In this regard, it is submitted, notwithstanding the arguments in favour of disgorgement of the defendant's profit from his breach of contract, that so long as due regard is paid to the valuation of that for which the plaintiff has bargained - that which he expected to receive from performance of the contract - there appears to be no need to resort to notions of disgorgement.

The other upshot of the compensatory principle is that, as a general rule at common law, punitive or exemplary damages will not be awarded for breach of

²² See for e.g., Dawson, "Restitution or Damages?" (1959) 20 Ohio St. L.J. 175 at 185-189; Palmer, *Law of Restitution*, 1978, vol. 1, para. 4.9; Friedmann, "Restitution of Benefits Obtained through the Appropriation of Property on the Commission of a Wrong" (1980) 80 Col. L.R. 504, 513 et seq.; and Farnworth, "Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985) 94 Yale L.J. 1339.

²³ See Jones, "The Recovery of Benefits Gained from A Breach of Contract" (1983) 99 L.Q.R. 443, in which he chronicles instances where the defendant's gain has been used by the courts to determine the plaintiff's loss.

²⁴ BCA/1/79 (Bamenda, 10/04/1979, unreported).

contract. The reasoning behind this rule is that the object for an action in damages is not to punish the defendant but to compensate the plaintiff. However, exemplary damages may be awarded as a punitive measure for the deliberate commission of a tort. In such cases it is said that the damages are awarded not to compensate the plaintiff but to express the court's condemnation of the defendant's conduct.²⁵ Where it is possible for the plaintiff to found an action both in tort and for breach of contract, he may be able to recover punitive damages by framing his action in tort. That was so in *Drane v. Evangelou*,²⁶ where punitive damages were awarded against a landlord who was guilty both of breach and trespass because he had unlawfully evicted his tenant. In the Cameroonian case of *Emmanuel Musoko v. Jesco Manga Williams*,²⁷ punitive damages were awarded against the defendant (landlord), who was guilty of both breach of the tenancy agreement and trespass, having unlawfully thrown out the goods of the plaintiff from rented premises. His appeal against the damages was met with even stronger condemnation from the Court of Appeal.²⁸ Njamsi J., delivering the unanimous judgement of the court, described his conduct as "...not only illegal but malicious and highly provocative." The Appeal Court then matched their disapproval of the defendant's conduct by increasing the punitive damages that had been awarded against him by the trial court. Other instances in which Cameroonian (common law) courts have also awarded punitive damages include *John Atanga & Ndifor Fombotioh v. Mbah & B.I.C.I.C*²⁹ in which punitive were awarded against the defendant bank for breach of its fiduciary duty of care against the plaintiffs, and *Eboule Ndoumbe & Office National de la*

²⁵ See the *International Encyclopedia of Comparative Law* Vol. XI, Ch. 8 s. 107-114.

²⁶ [1978] 1 W.L.R. 455.

²⁷ HCSW/19/79 (Buea, 4/4/1981, unreported).

²⁸ CASWP/36/83 (Buea, 2/7/84, unreported).

²⁹ HCF/38/87 (Buea, 4/4/1989, unreported).

*Lotterie Nationale v. Brufis Zacheus Ringwi*³⁰ in which the *National Lottery* was at the receiving end of punitive damages for refusing, in breach of its contractual obligation, to settle what was an objectively good claim.

A most notable exception to the rule that punitive damages are not recoverable for breach of contract is the award of such damages for breach of promise to marry. In *Samuel Esobe Epitime v. Ruth Nange Mbong*,³¹ the West Cameroon Court of Appeal upheld the judgment of the trial court in which damages had been awarded against the appellant for breach of promise to marry the respondent. That case was decided in 1968 and was based on the application of the common law, a position which no longer applies in England, thanks to *section 1 of the Law Reform (Miscellaneous Provisions) Act 1970*,³² which provides that an agreement to marry shall not have effect as a contract and no action shall lie for breach of such agreement. But the Law Reform Act 1970 is a post-1900 statute and as such does not apply to Common Law Cameroon. This implies that the law in Common Law Cameroon still imposes liability for such conduct. This is illustrated by the decision in *Ronate Taping v. Joshua Mobit*.³³ In that case the Bamenda Court dismissed an action for breach of promise to marry, not because the party in breach was not liable, but because of a technicality, namely, that the party who had brought the action was not the one from whom consideration had moved. He was therefore not privy to the contract. But by admitting that had the proper party sued, he would have succeeded, the Court of Appeal confirmed the view that common law position which imposes liability for breach of contract of promise to marry still applies in Common Law Cameroon.

³⁰ CASWP/44/83 (Buea, 26/6/1984, unreported).

³¹ [1968] W.C.L.R. 41.

³² See generally Cretney, *The Law Reform (Miscellaneous Provisions) Act 1970* (1970) 33 M.L.R., 534.

³³ BCA/31/74 (Bamenda, unreported).

In **Civil Law Cameroon** the position, as underlined by article 1149 of the Civil Code, also starts from the proposition that damages are compensatory i.e., the purpose of an award of damages is to compensate the plaintiff for the loss which he has suffered as a result of the non-performance of the contract. It is true that the French *astreinte* to some extent punishes the defendant, but it will become clear when that concept is discussed below, that it does so for the defendant's contumacy in the face of the court's decree rather than for his failure to perform the contract.

Because the remedy of damages is not generally considered to be the primary remedy in the civil law systems, it is not as multi-faceted as is the case with the common law. Suffice it to say that the proposition that damages are compensatory is subject to the requirement that loss should be the "immediate and direct consequence of the non-performance",³⁴ and, in the case of non-performance which is not attributable to *dol*, by the further requirement that the loss should have been foreseeable.³⁵ There is also the requirement of *mise en demeure*, or notice to perform, without which in principle no damages are due.³⁶ As these issues are treated in more detail under the limitations on the award of damages, no more needs to be said of them here.

(2). The Interests Protected.³⁷

Two issues are involved here. The first is to determine the kind of loss for which the defendant will be awarded damages and the second relates to the assessment of

³⁴ Article 1151 CC.

³⁵ Article 1150 CC.

³⁶ Article 1146 CC.

³⁷ The famous and influential article by Fuller and Perdue, "*Reliance Interest in Contract Damages*" (1936) 46 Yale L.J. 52, 373, classifying the interests protected by contract remedies into restitution, reliance and expectation, provides a useful guide here..

damages, once it is established that the loss suffered is of the kind for which the plaintiff is entitled to recover.

(a). Recoverable Loss.

In **Common Law Cameroon**, the three types of interests identified in common law jurisdictions - loss of bargain, reliance loss and restitutionary interests - are generally recognized and protected.

Loss of bargain: At the heart of the law on damages under the common law lies the concept that the plaintiff is, by the award, to be put in the same position, so far as money can do, as he would have been had the contract been performed. Although that principle may not have been formally stated prior to the judgement of Parke B., in **Robinson v. Harman**,³⁸ there would appear to be little doubt that it has been the guiding spirit in the assessment of damages since the early years of the 18th century.³⁹ It follows from that principle that the plaintiff is entitled to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected. This process has been called compensating the aggrieved party for loss of his bargain or of his "expectation interests".⁴⁰ For judicial support, if any was needed, of the assertion that the expectation interest is protected in Cameroon, one needs look no further than the decision of the Bamenda High Court in **Alfred Mbah v. Roland Boman & Joseph Ncho**,⁴¹ in which Arrey J., repeated with approval the position in **Robinson v. Harman**,

"Damages for breach of contract are a compensation to the plaintiff for the damage or loss he has suffered through that breach. He is to be placed in the same position as if the contract had been performed".

Sometimes, a plaintiff may have two kinds of expectations - that of receiving the

³⁸ (1848) 1 Ex. 850, 855.

³⁹ See in particular Washington, Op.Cit., note 18, (1932) 48 L.Q.R. 96.

⁴⁰ Fuller and Perdue, Op.Cit., note 37.

⁴¹ HCB/73/85 (Bamenda, 26/5/1987, unreported).

promised performance (e.g. machinery) and that of being able to put it to some particular use (e.g. for manufacture). In such a case, if defendant fails to deliver, the plaintiff will be entitled to damages based on the value of the machinery that he should have received and also to damages for loss of profits suffered as a result of the failure in delivery.

Reliance loss: In this case, the object is to put the aggrieved party into the situation into which he would have been if the contract had never been performed. This may be done by compensating him for expenses or other losses incurred in reliance of the contract. So far as concerns recovery by the plaintiff of his reliance loss, it can be said that the courts in Common Law Cameroon will allow him to succeed. This is demonstrated by two recent decisions. Both cases raised important questions relating to offer, acceptance and consideration which have already been considered in chapters 5 and 6 above. So, only the question of reliance damages is considered here. In the first case, *Ambe John v. Brasseries du Cameroon*,⁴² the plaintiff offered to become a wholesaler for the defendants (the largest brewery in the country). During the course of the negotiations, the plaintiff was told by the defendant's local manager that in order to qualify as a wholesaler, he would have to do various acts, namely: show proof of adequate storage capacity and acquire the necessary means of transport. Spurred on, the plaintiff set about fulfilling these requirements (knocking down and restructuring his premises in the process) in preparation of the contract. The defendants, upon inspection and satisfaction of the facilities, appointed the plaintiff as their wholesaler. Business was always fine between the two until things took a sour turn after the plaintiff returned some of the defendant's products for replacement, complaining quite rightly, that they contained strange substances. In the bullish manner that has become typical of many large corporations all over the world, the defendants responded, without warning or notice, by putting a complete stop to all business transactions with the plaintiff. It was held by the Bamenda High Court that the plaintiff must succeed in his action in damages

⁴² HCB/51/90 (Bamenda, 6/4/1992, unreported).

for breach of contract. The court did not specifically say which interest (expectation or reliance) it was protecting but its rejection of the plaintiff's claim for losses relating to a bank loan on the grounds that it was not proven to have resulted as a direct consequence of the contract, is indicative of the fact that the court felt it was protecting other losses that were incurred directly in reliance on the contract.

In the other case, *Brasseries du Cameroun v. Achuo Daniel*,⁴³ the appellants had for many years engaged the respondent as their sole distributor in the North West Province. As their business expanded, the appellants advised the respondent to procure more lorry trucks to be used for the transportation of their products. He duly obliged by taking 4 Mercedes trucks on hire purchase. With the proceeds from the business the respondent was able to service the loan repayment with little difficulty. Then, without warning or notice, the appellants stopped supplying the respondent with their products for distribution. Not surprisingly, this caused the respondent a lot of hardship, not least because he was finding it impossible to keep up the hire instalments for the four trucks. In an action for breach of contract, the Bamenda High Court held that the plaintiff was entitled to be compensated for the loss that he had suffered as a result of the breach. The Court of Appeal said they saw no reason to disagree with that finding but did not say which loss was being redressed. However, the fact that the court felt very strongly about the hire purchase deal which the respondent had entered into through reliance on the appellants, implies that his reliance loss was a major factor in the measure of the award.

In the case just considered, the loss was definitely post-contractual (the trucks having been obtained well into the relationship) but in the earlier case, it is not clear whether the plaintiff undertook the restructuring of his premises before the contract was formally concluded or after. In other words, it is not clear whether the expenses incurred were pre or post-contractual. Either way, there is a good case for saying he was entitled to recover. In England, for instance, it is now settled that pre-

⁴³ BCA/24/91 (Bamenda, 19/3/1992, unreported).

contractual expenditure is recoverable.⁴⁴ And that is so even if it was incurred in reliance on an *agreement* before that agreement had become a legally binding *contract*.⁴⁵ On this interpretation, the argument by Brasseries du Cameroun in the *Ambe John case*, that there was no legally binding *contract* between the parties at the time the plaintiff undertook changes to his premises (though rejected by the court),⁴⁶ would not have, granted it was accepted, absolved them from liability. The plaintiff would still have been entitled to succeed. Since this analysis is not that of the court, it can only be hoped that whenever the question eventually arises, the courts will use the opportunity to make it part of the case law of Cameroon that pre-contractual expenditure, even if incurred before the *agreement* becomes a legally binding *contract*, is recoverable, subject of course to the policy limitations of the notion of remoteness.

It must be stressed once again that in neither case did the courts think they were laying down any rule on the protection of the reliance interest as such. I have cited these cases only to show that even though the expectation loss is the primary basis for compensation, Cameroonian common law courts, whether consciously or not, also compensate reliance loss.

Restitution: The restitutionary remedy restores to the plaintiff benefits conferred on the defendant in the performance of the contract. It may simply be part of the reliance interest measure. The most obvious example is a buyer's claim for repayment of the price on account of non-delivery. The restitutionary remedy may be awarded independently, usually to deprive the defendant of an unjust enrichment in cases where no breach of contract has occurred, e.g. where the contract was void

⁴⁴ *Anglia Television Ltd. v. Reed* [1972] 1 O.B. 60 and the ensuing note by Guest, 88 L.Q.R. 168; see also Ogus, "Damages for Pre-contract Expenditure" (1972) 35 M.L.R. 423; Clark, "Damages for Pre-contract Expenditure" (1972) C.L.J. 22.

⁴⁵ *Lloyd v. Stanbury* [1971] 1 W.L.R. 535.

⁴⁶ See chapter 6.

for mistake or was terminated for frustration.⁴⁷

The three protected interests are not entirely exclusive of each other. They do overlap at times in the sense that an aggrieved party may be entitled to damages for loss of his bargain and for reliance loss and restitution.⁴⁸ And from the Cameroonian cases just considered, it is by no means well settled exactly when damages will be based on expectation as opposed to reliance or restitutionary interests, or to what extent one of these bases can be combined with another. But it can safely be said that despite the arguments of Fuller and Perdue half a century ago that primary protection should be accorded to the plaintiff's reliance interest, and the attempts to develop and apply them to England by Atiyah,⁴⁹ English courts continue to measure his loss in a way which protects his expectation interests.⁵⁰ If Fuller and Perdue's message has not gained much ground in the English courts, from where the courts in Common Law Cameroon take their lead whenever they are minded to do so, then, *a fortiori*, it has gained even less ground in Cameroon.

In **Civil Law Cameroon**, the various types of interests protected by the law are not as well developed as they are in the common law. One reason for this is that French law insists, in principle, on the notion of damages consisting of a complete indemnity against loss, so that the distinction between reliance damages (*intérêt*

⁴⁷ For an extensive discussion of restitution on the grounds of mistake, see Goff and Jones: **Law of Restitution** (4th edn) 1991, p. 107 ff, and Butler, "*Mistaken Payments, Change of Position and Restitution*" In: **Essays on Restitution**, (ed. Finn), 1994, p. 87 ff.

⁴⁸ On their interrelation, see Fuller, *Op. cit.*, note 37, p. 71.

⁴⁹ Atiyah, **The Rise and Fall of Freedom of Contract**, 1979, esp. at pp. 419-54; "*The Theoretical Basis of Contract Law: An English Perspective*" (1981) 1 Int. R. of Law & Econ. 183; Ibid, "*Contracts, Promises and the Law of Obligations*" In: **Essays on Contract Law**, 1990, chapter 2, p. 21ff.

⁵⁰ See also Owen, "*Some Aspects of the Recovery of Reliance Damages in the Law of Contract*" (1986) 4 O.J.L.S. 393.

négatif) and expectation damages (*intérêt positif*) is not recognized in French law.⁵¹ Another reason is that the Civil Code, subject to what is discussed below, does not make use of the distinction. And because the Code is silent, the Supreme Court is powerless to orchestrate any such development because it does not control damage awards in the same way as the appellate courts in common law jurisdictions. Its reviewing power is confined to questions of law so that it will only review an assessment of damages by a lower court if that court applied wrong principles of law.⁵² This has tended to inhibit analysis of the various elements constituting damages for breach of contract.

However, it is possible to extract a distinction between expectation and reliance loss from article 1149 of the Civil Code. This article sets out the traditional civil law headings under which all loss is seen as falling. It provides that the damages due to the creditor consists of two elements: the loss which he has suffered (*la perte qu'il a faite*) and the gain which he has failed to make (*le gain dont il a été privé*). These phrases are better known as *damnum emergens* and *lucrum cessans* respectively, and are sometimes used to differentiate between reliance and expectation loss. They are also used in a different sense to refer to two kinds of expectation loss. For example, where the seller wrongfully fails to deliver the goods, the buyer can *prima facie* recover both types of loss of expectation: his *damnum emergens* in not having the goods, especially if the price at which he can buy replacement goods is higher than the contract price⁵³ and his *lucrum cessans* losing resale profits. Neither the Civil Code nor the Cameroonian courts attribute any consequences to this distinction even

⁵¹ Rouhette, "The Obligatory Force of Contract in French Law" In: Harris and Tallon, eds., **Contract law Today: Anglo-French Comparisons**, 1989, p.75; see also Nicholas, p.221.

⁵² Planiol & Ripert, vol. VII, para. 855. For more light on the role of the *Cour de Cassation* (and by analogy the Cameroon Supreme Court) in the interpretation of contracts, see Marty/Raynaud, **Les Obligations**, t.1, 1988, para. 244.

⁵³ Cf Sale of Goods Act 1893, s. 51(3).

if in some cases, for example, *La SA FEFRACAM v. B.E.A.C.*,⁵⁴ the plaintiffs expressly made their claims under the separate heads of *damnum emergens* and *lucrum cessans*. Sometimes the awards actually reflect that distinction. That was so in *Mikes Skyllas v. Camer Industrielle*.⁵⁵ The parties entered into a contract in which the plaintiff was appointed by the defendants (dealers in Yamaha motorbikes) as their exclusive agent in the Centre-South and the East provinces. The defendants were later to appoint other agents, in breach of the exclusive agency, and worse still, discontinued all supplies to the plaintiff. The plaintiff sued, claiming damages, amongst other things, for the defendants failure to supply and for the lost gain from resale. It was held he must succeed in both claims. But *Société Express Colis v. S.H.O. Africauto*⁵⁶ is more representative of the customary practice of the civil law courts, whereby they simply award a global sum that covers all kinds of loss. In that case, the plaintiff (a haulage company) undertook to use only Mazda vehicles for whom the defendants were sole distributors. In return the defendants were to provide the plaintiffs with spare parts for the vehicles and use only the plaintiffs for all their (the defendants') transportation. In breach of the contract, the defendants failed (1) to provide spare parts, causing many of plaintiffs vehicles to be grounded and (2) to provide them with transportation assignments. The Yaounde High Court awarded a global sum to compensate the plaintiff for the loss suffered due to defendant's breach (failure to supply spare parts and to provide transportation assignments) and for loss of profits. The court did not (and the courts do not have to)⁵⁷ make any distinction between *damnum emergens* and *lucrum cessans* or any separate estimate for each head of loss.

A superficial comparison with the common law might suggest a striking similarity between, on the one hand, "deprived gain" and expectation interest and on the other

⁵⁴ J.C. No. 272 du 27 Mars 1991 (T.G.I, Yaounde, unreported).

⁵⁵ J.C. No. 620 du 13 Juillet 1988 (T.G.I, Yaounde, unreported).

⁵⁶ J.C. No. 480 du 16 Mai 1988 (T.G.I, Yaounde, unreported).

⁵⁷ Tallon, "Remedies: French Report" In: Harris and Tallon, eds., p. 262.

hand, "loss incurred" and reliance interest. Nicholas has pertinently demonstrated that this is not so, and while "deprived gain" is necessarily an expectation loss, "loss incurred" may be either a reliance or expectation loss.⁵⁸

(b). The Assessment of Damages.

Once it is established that the loss suffered by the plaintiff is of the kind for which he must be awarded damages, the court has to translate that loss into money terms since damages always consist of a sum of money. However, because this chapter is primarily concerned with the availability of remedies (in this section, damages) and not with quantification, I shall only focus briefly on the general character of quantification rules. These rules are largely discretionary under both systems.⁵⁹

The **Common Law** position is summed up by the observation that "the assessment of damages is not an exact science."⁶⁰ This suggests that much is left to the discretion of the judges. It is true that there are certain guidelines for the courts to use as bases of their assessment but even these do not escape the discretion of the judges.

Where the claim is based either on reliance loss or restitution, the bases of assessment are so straightforward as to require any elaboration here. It is with claims for expectation loss that the bases for assessment becomes more complicated. For such claims, English law distinguishes between two methods of assessment:⁶¹ the *difference in value* and the *cost of cure*. These have also been called the *diminutive*

⁵⁸ Nicholas, p. 200ff.

⁵⁹ Treitel, **Remedies**, ss. 99-107.

⁶⁰ Per Lord Upjohn in *The Heron II, Koufos v. C. Czarnikov Ltd.* [1969] 1 A.C. 350, 425.

⁶¹ Other bases of assessment relating to actual and market values, taxation (*British Transport Commission v. Gourley* [1956] A.C. 185) etc., are not considered.

and the *reinstatement* measures.⁶² The distinction between these measures is now invariably explained by reference to the American case of *Peevyhouse v. Garland Coal Co.*⁶³

While it is possible to posit from the evidence of judgement awards that the courts in Common Law Cameroon do recognise and apply both methods of assessment, there is no clear principle emerging from Cameroonian case-law (or English case-law for that matter) as to how the court should, in general, exercise the choice between the two measures. The "cost of cure" measure tends to be preferred in contracts dealing with premises or building works and it can be discerned in the judgement of the Bamenda High Court in *Samuel Longla v. Compagnie Générale D'électricité Cameroun*.⁶⁴ The defendants were contracted to instal an intercom telephone system in a hotel owned by the defendant. The work when supposedly completed was defective and as a result, the intercom system was always faulty. The plaintiff eventually hired another firm to remedy the defects in the telephone system. It was held that the plaintiff was entitled to recover the cost of putting the defects right.

In **Civil Law Cameroon**, the position is not any different from that in France, which is that the rules which determine the assessment of damages contain considerable elements of vagueness and uncertainty. Even the relevant provisions of the Civil Code are formulated in very general terms. For example, the principle of full compensation as postulated in article 1149: "The damages due to the creditor are, in general, those arising from the loss he has incurred and the benefit of which he has been deprived." This is qualified by article 1151 which limits compensation to the "immediate and direct consequence of the breach of contract." It may be helpful to note that the trial judge in Civil Law Cameroon has a broad power over the

⁶² Harris, Ogus, and Phillips, "*Contract Remedies and the Consumer Surplus*" (1979) 75 L.Q.R. 581, 584-94.

⁶³ 382 P. 2d 109 (1962), see Treitel, p. 728.

⁶⁴ HCB/54/89 (Bamenda, 4/9/1989, unreported).

assessment of damages (which is a question of fact), over which the Supreme Court can exercise only a formal control i.e., if there has been an error of law. Perhaps because the appellate courts are hamstrung by the *pouvoir souverain* granted to the trial judge, this subject is little developed both in Civil Law Cameroon and France.

Further, since judges in Civil Law Cameroon give very brief reasons for their judgement, it is particularly difficult (certainly more so than in Common Law Cameroon) to properly grasp the process of quantification of damages. It is rather amazing (at least from a common law perspective) that sometimes the more elliptical the basis of an award or the less a judge says about that basis, the more difficult it is to upset it.

The overriding principle remains that enshrined in article 1149 i.e., damages should compensate the creditor for the loss suffered. Unlike the common law, the court's disapproval or censure of the debtor's conduct is not a factor in the assessment of damages under the civil law. However, Nicholas's observation that the trial court can take account of it so long as it makes no express reference to it,⁶⁵ is equally true of Cameroon.⁶⁶ Finally, damages are calculated as of date of judgement, not date of non-performance.

(3). Limitation of Damages.

Under both English and French law, there are several doctrines limiting the amount which may be recovered in damages. Only the most important or frequently

⁶⁵ Nicholas, p. 226.

⁶⁶ Examples abound in which the court's disapproval of the defendant's conduct (precisely his bad faith) appear to be reflected in the amount of damages awarded to the aggrieved party. For example, *Kamdem Guemmen v. Tsebo Jean-Marie (infra)*, in which the defendant was adjudged not only to be in breach of the contract by failing to return the hired car or pay the hire dues, but to have acted in bad faith in doing so. The point must be emphasised that while such a factor certainly influences the courts, they do not expressly use it or profess to use it in the assessment of damages.

used ones are considered here.⁶⁷

(a). Remoteness.

Under the common law the amount of damages recoverable is subject to the policy limitations of the notion of remoteness. This means that the plaintiff can recover only for those losses which were reasonably foreseeable, or of which the defendant had specific notice, at the time of agreement. These rules of damages are designed to ensure that the parties can take account of the relevant risks when making the contract and, in particular, in the negotiation of the price.⁶⁸

The notion of remoteness is invariably illustrated by referring to the leading case of *Hadley v. Baxendale*⁶⁹ in which the court set out quite deliberately to formulate a remoteness doctrine for contract. The case laid down two rules which must be satisfied before the defendant is liable. First, the loss must arise 'naturally' i.e. according to the usual course of things from such breach of contract itself. This test was not satisfied in *Hadley v. Baxendale* but was satisfied in the *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*.⁷⁰ Secondly, the loss must be such as may have reasonably be supposed to have been in the minds of both parties at the time they made the contract as the probable result of the breach. For this test to be satisfied, the defendant must not only have been aware of the plaintiff's special circumstances, but must have accepted them. However, in the wake of the decision in *The Heron II*,⁷¹ a much higher degree of probability is now required to satisfy the test of remoteness in contract. The emphasis is simply no longer on reasonable

⁶⁷ Treitel, *Remedies*, chap. VI, identifies and discusses seven.

⁶⁸ For a penetrating analysis which reveals the difficulties of drawing simple economic inferences from the foreseeability rules, see Perloff, "*Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale*" (1981) 10 J.Leg. Stud. 39.

⁶⁹ (1854) 9 Exch. 341.

⁷⁰ [1949] 2 K.B. 528.

⁷¹ *Koufos v. C. Czarnikow Ltd.* [1969] 1 A.C. 350.

foreseeability.

Even though the law in England has travelled a long way since *Hadley v. Baxendale*,⁷² and despite criticisms of that case and appeals for a broader approach to remoteness,⁷³ the famous case is still being loyally cited in England and very much remains also the sheet anchor of authority on the notion of remoteness in contract in Common Law Cameroon. It was applied most appropriately in *Forbah Joseph v. National Lottery Corporation*.⁷⁴ The plaintiff bought a lottery ticket in Bamenda which was successful in the draw, with a winning amount of 2.000.000 francs. For unexplained reasons, the defendants would not pay plaintiff immediately. After some vain trips to the defendants head office in Yaounde, payment was still not forthcoming. The plaintiff was forced to resort to court action, in which he claimed the amount won i.e. 2.000.000 francs, plus 4.000.000 francs for breach of contract. Faced with this lawsuit, the National Lottery agreed to pay the plaintiff the 2.000.000 francs prize money. The plaintiff accepted payment but proceeded with his 4.000.000 francs claim for breach of contract. This figure was based on the loss he claimed to have suffered as a result of the defendants' undue delay in paying him the prize money, namely: (1) being harassed by friends who felt he had been paid the money and was avoiding them; (2) abandoning his application for a building loan which brought about a delay in the construction of his retirement home, the effect from which, according to him, he was still suffering because of the rise in the cost of building materials during the delay; and (3) the transport costs of two trips he made to Yaounde in pursuit of payment. The Bamenda High Court rehearsed the remoteness tests as laid down in *Hadley v. Baxendale* and ruled that the plaintiff's claim satisfied neither of them. The court underlined the fact that "there were no

⁷² See for example the Court of Appeal decision in *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.* [1977] 3 W.L.R. 990 and the brief discussion by D. Hadjihambis, "Remoteness of Damage in Contract" (1978) 41 M.L.R. 483.

⁷³ Cooke, "Remoteness of Damages and Judicial Discretion" (1978) 41 M.L.R. 288.

⁷⁴ HCB/44/84 (Bamenda, 1/3/1985, unreported).

exceptional losses resulting from the breach in the special circumstances because knowledge must exist at or before the making of the contract". The damages claimed were therefore considered as too remote, and rightly so since it is hard to imagine how they could have been considered otherwise. The claim for social harassment, for example, was nothing short of laughable. Having rejected the main claim, the court nevertheless accepted that the defendants were guilty of breach of contract for which the plaintiff was entitled to general damages.

It is difficult to say with any certainty whether the change in emphasis heralded by *The Heron II* will be adopted by Cameroonian courts. So far there is no evidence of that and my informed view is that Cameroonian courts will continue to stick to the *Hadley v. Baxendale* formulation partly because they are bound by it, whereas *The Heron II* is, in principle, at best persuasive, being a post-1900 decision, and partly because (like *Stilk v. Myrick*⁷⁵), it is one of those famous common law cases of venerable antiquity that continue to state the law no matter how much they are criticized or shown to be dated.

In **Civil Law Cameroon**, there are analogues to the common law notion of remoteness. These are the requirements of directness and foreseeability. Like the remoteness rules, they serve to limit the amount of loss for which damages will be paid. Both requirements have their places in the Code. Article 1149 which provides for the award of damages to the creditor is therefore subject to two exceptions. The first is article 1150 which provides that when the non-performance is not due to the *dol* of the debtor, he is liable only for such damage that was foreseen or could have been foreseen at the time of the contract (*qui ont été prévus ou qu'on a pu prévoir lors du contrat*). The other exception, as laid down in article 1151 provides that even where the breach is attributable to the *dol* of the debtor, he is only liable for such damage which is the immediate and direct consequence of the breach (*qui est une suite immédiate et directe de l'inexécution de la convention*). The effect of both

⁷⁵ (1809) 2 Camp. 317.

articles has been finely summarised thus,⁷⁶ "the debtor whose fault does not amount to *dol* is liable only for such direct damage that was foreseeable whereas the debtor who is guilty of *dol* is liable for all direct loss, whether foreseeable or not".

I have found no instances of the application of the foreseeability and directness rules in Civil Law Cameroon. This is perhaps to do with the fact that most breaches of contracts do not involve *dol*, which is central to both articles 1150 and 1151. It is probably for this reason that in France the decided cases are mainly in *delict*.⁷⁷ Whether that is the case in Civil Law Cameroon, I am not in a position to know since this study has hardly touched on *delict*. However, it is obvious from some judgements that the courts are mindful of the rules of foreseeability and directness when awarding damages. For example, in *Société Sigma 2000 v. Nguedia Albert*,⁷⁸ the defendant refused to complete payment and take possession of a house he had asked plaintiffs to build because, he claimed, there were defects in the building. But even after the plaintiffs agreed to bear the costs (determined by an independent expert) of the said defects, the plaintiff would still not perform. As a result of the defendant's unwarranted refusal to take possession of the house, the plaintiffs thought it wise to hire security guards to look after the building. In an action against the defendant, the plaintiffs claimed the balance of the contract price plus the costs of hiring security guards. The defendant hotly contested the latter claim, even daring to suggest that the security guards the plaintiffs were referring to, were in fact tenants. The court found as a fact that they were guards and held that the plaintiffs were entitled to succeed in both claims. This, it is submitted, is the proper decision. The claim based on the balance of the contract price is straightforward, thus nothing need be said about it. As concerns the claim for security costs, the court took the view that the delay in the completion of the contract was attributable to the defendant and although the judge did not rationalise his decision in such terms, he clearly must

⁷⁶ Nicholas, p. 223.

⁷⁷ Marty & Raynaud, para. 481.

⁷⁸ J.C. no. 438 du 2 Mai 1988.

have felt that this loss did not fall within the exceptions of foreseeability and directness. Not only was it foreseeable (and the test here is objective) that the failure by the defendant to take over the house would require the plaintiffs to take reasonable steps to prevent thieves from ransacking it, the loss thus incurred was a direct consequence of the defendant's refusal to perform. It should be said that there is no established criterion under the civil law for determining what damage is direct.⁷⁹

On the face of it, the common law rule in *Hadley v. Baxendale* and the civil law rule in article 1150 would appear to apply the same principle of foreseeability. However, on the question of foreseeability, the civil law departs from its usual attachment to the subjective test in favour of an objective criterion. Article 1150 refers to damage "*qu'on a dû prévoir*" (which one could have foreseen), and not damage "which he could have foreseen". Applying the objective criterion to the *Affaire Sigma 2000* (which it is presumed the judge did) one easily appreciates why the loss incurred in security costs by the plaintiffs was considered to be foreseeable.

(b) Mitigation.

The rule that the aggrieved party is entitled to damages is also subject to the principle that the plaintiff must mitigate damages. Mitigation may be treated as involving the existence of an actual, formal duty to mitigate; or as a matter of causation - the plaintiff's loss is attributable to his own unreasonable conduct and not to the defendant's breach of contract.⁸⁰ Either way, it involves a serious limit on the plaintiff's rights. Causation is dealt with in the next section.

At common law, **the duty to mitigate** involves the following rules.⁸¹ First, it prescribes that damages should be limited to those losses which could not reasonably

⁷⁹ Nicholas, p. 224.

⁸⁰ See the *The Soholt* [1983] 1 Ll. Rep. 605.

⁸¹ McGregor on Damages, paras. 273-277.

be avoided by the plaintiff following breach.⁸² This explains why, when the contract takes place within a competitive market setting, the plaintiff normally obtains the difference between the contract price and the market price at the date of breach; he is expected to secure a substitute. Secondly, the aggrieved party may be bound to refrain from taking steps which in view of the default may unjustifiably augment the loss even though any expenses reasonably incurred in avoiding loss resulting from breach of contract may be charged to the defendant. Thirdly, any action that the aggrieved party takes after the breach, which in fact minimises or avoids the loss, will serve correspondingly to reduce the guilty party's liability in damages. Mitigation is thus said to perform an economic function of encouraging efficiency in the allocation of resources.⁸³

Without elaborating on the various rules of mitigation, it can comfortably be stated that the courts in Common Law Cameroon show sufficient awareness of the principle. This point can be supported by referring to the case of *David Tala Ndi v. Chamba Wanji Daniel*⁸⁴ in which the principle was appropriately applied. The appellant, a timber dealer hired the respondent's engine saw. The contract was to run from 25th March 1986 to 6th May 1986 i.e. for 40 days. The appellant was to pay either 30.000 francs in cash or in iroko timber worth that amount as the costs of hire. It was further stipulated that the hirer would pay a penalty of 5.000 francs for each day of delay until the saw was returned and pay the sum of 200.000 francs as the cost of the saw in the event that it was damaged. The hirer never paid the hire price, either in cash or kind, and worse still, failed to return the saw at the end of the agreed period of hire. Yet it was not until February 1987 that the owner wrote to the hirer demanding full payment of the rents arrears and threatening him with legal action, which he finally began in March 1987. The Bamenda High Court generously

⁸² See Bridge, "Mitigation of Damages in Contract and the Meaning of Avoidable Loss" (1989) 105 L.Q.R. 398.

⁸³ Goetz and Scott, "The Mitigation Principle: Toward a General Theory of Contractual Obligation" (1983) 69 U. Virginia L.R. 967.

⁸⁴ BCA/28/89 (Bamenda, 5/7/1991, unreported).

awarded him a global sum of 3.630.000 francs in damages, presumably to cover his claim for rents arrears plus general damages for breach of contract. Stung by the size of the award, the hirer appealed, and argued, *inter alia*, that the High Court had erred in law in failing to hold that the plaintiff was under a duty to mitigate his damages. The Court of Appeal agreed with the High Court that the defendant was guilty of breach, but on the issue of mitigation, it was attracted by the appellant's arguments. The court noted that the owner by his own admission, had waited for 12 months before taking any action. In the circumstances, the Appeal Court continued, "the plaintiff/respondent is bound in law to have brought his claim within a reasonable time in order to mitigate his damage". In arriving at this decision, the court expressly relied on the English case of *British Westinghouse Electric Co. Ltd. v. Underground Electric Railways*,⁸⁵ in which, it will be recalled, the rule was again laid down that the principle in favour of compensation for pecuniary loss naturally flowing from the breach is qualified by the principle which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

As concerns the rule against augmentation of loss, English courts have taken a curious stance in cases where a person who is to receive money for performing his part of the contract proceeds to perform in disregard of the other party's wrongful repudiation of the contract. It is that the aggrieved party is, as a general rule, entitled to perform in spite of the repudiation and claim the agreed sum.⁸⁶ In the United States, on the other hand, the aggrieved party is expected to desist and claim damages.⁸⁷ It is doubtful if the Cameroonian courts accept the English view - certainly not in light of the decision in *Fon E.F.F. Njifonuh II v. Emens Textiles*

⁸⁵ [1912] A.C. 673.

⁸⁶ See the leading case of *White and Carter v. McGregor (Councils) Ltd. v. McGregor* [1962] A.C. 413.

⁸⁷ See *Clark v. Marsiglia* 1 Denio 317 (N.Y., 1845).

International.⁸⁸ The parties entered into a tenancy agreement on 1st July 1966, whereby the plaintiff let out his buildings to the defendants. It was agreed that either party could terminate the contract by giving three months notice in writing. The defendants, with a view to terminating the contract served the plaintiff with a notice to that effect, a notice which they claimed the latter refused to accept. They then applied and obtained a Magistrate Court order to terminate the lease, whereupon they vacated the premises on 25th August 1967. The plaintiff appealed against that order, complaining that he had not been aware of any notice. The High Court overturned the Magistrate Court ruling and ordered the defendants to serve the plaintiff with a formal notice. In contempt of the court order, the defendants refused to do so because they had already effectively vacated the premises. It was a further two years before the plaintiff took the keys from the defendants and only then did he accept that they had vacated his premises. In other words, he still considered them to be in occupation during that period. In an action for rents for that period and general damages for breach, it was held that he was not entitled to rents for all that period. He was only entitled to three months rents in lieu of notice that the defendants had failed to give as recommended by the High Court. The court ruled that as he had been aware after the Magistrate Court order that the defendants were no longer prepared to continue with the tenancy agreement, he had been under a duty to mitigate his loss. That is to say, even though the defendants were guilty of wrongful repudiation of the contract, by refusing to give the plaintiff a formal notice as ordered by the High Court, the plaintiff was not entitled to treat the contract as continuing, therefore, to claim rents for the period up to 1969 "would be to ask for too much knowing fully well on 25th August that they (the defendants) had gone". This case, it must be said, did not involve anticipatory breach as did the *White and Carter* case but it can be used as authority for the proposition that in Common Law Cameroon, an aggrieved party must not continue in the performance of an obligation which he is fully aware the other party has already repudiated as that may offend against the

⁸⁸ HCB/24/68 (Bamenda, 5/2/1971, unreported).

rule that he should not augment loss. As a general principle, this position similar to the American one, is preferred to the English view adopted in *White and Carter*, for it may be assumed (in the instant case, that in fact was true) that the repudiating party no longer requires performance.

Although it is not impossible to find instances in French case law (e.g. cases where a plaintiff was denied the cost of repairing damaged goods where this exceeded their diminution value) which can be rationalized in terms of mitigation, the civil law generally (and Civil Law Cameroon in particular) does not think in terms of the common law's 'duty' to mitigate. The same emphasis on the 'reasonable' responses of plaintiffs to breach does not exist.

This is perfectly illustrated by *Affaire Kamdem Guemmen v. Tsebo Jean Marie*.⁸⁹ The defendant hired a car from the plaintiff at a rental cost of 10.000 francs a day. The contract was concluded on 15th September 1987. The defendant duly paid for 20 days and then stopped, without returning the car. As of 11th May 1989, the unpaid arrears, calculated by the plaintiff at 10.000 francs a day, had amounted to 5.500.000 francs. She sued for that sum and incredibly, the Yaounde *Tribunal de Grande Instance* held that she was entitled to every bit of it. The court did not even mention the fact that the plaintiff had failed to do take any action to limit her loss until 1989. It can also be said that by failing to take action within a reasonable period of time, the plaintiff was actually augmenting her loss, if one considers the fact that the accrued rents of 5.500.000 francs must have been well above the market value of the car at that time. There was no mention of this fact either. It must not be thought that this decision, strange as it is, is wrong in strict law. It is merely indicative of the absence of the principle of mitigation in Civil Law Cameroon.

The above civil law decision is in stark contrast with the common law decision in *David Tala v. Chamba Wanji*,⁹⁰ where the Bamenda Court of Appeal held that

⁸⁹ JC No. 121 du 16 Jan. 1991 (Yaounde, unreported).

⁹⁰ *Supra*, note 84.

respondent was not entitled to 12 months unpaid rents for his saw because by waiting for up to a year before bringing any action against the defaulting hirer, he had failed in his duty to mitigate the damage. So, while the owner under the common law could not claim just 12 months rents because of the common law duty to mitigate, the owner under the civil law was able to claim almost two years' delayed rents because of the absence of such a duty under the civil law. This reflects a fundamental difference of approach to breach of contract between the two systems. The common law is concerned more with commercial considerations while the civil law treats breach of contract as a form of moral wrongdoing. Little wonder that in making the very generous award in the *Kamdem Guemnem* case, the court was particular motivated by its belief that the defendant had shown a lot of bad faith in failing to pay the rentals while retaining the car.

(c). Causation.

At common law, a plaintiff can only recover damages if there is some causal link between the breach and his loss. So, if one alleges that a motor mechanic did not fit one's brakes properly, one will not succeed in a claim for damages against the mechanic in the event of an accident, if the source of the accident is not proven to be brake failure. In *Lawrence Finiakiy v. Pauline Epuli*⁹¹ the appellant had undertaken to complete the building work on the respondent's partially constructed house. The appellants advised that the partial structure should be demolished so that construction could be undertaken from scratch. This was because in his technical opinion, the half built structure was not strong enough. The respondent insisted that he continued with that structure as it was. After the roof had been mounted, a severe storm blew it away. The respondent brought an action for breach of contract and negligence and succeeded at first instance. But the Bamenda Court of Appeal had little difficulty in overturning the High Court decision. It was established by an independent expert, a local civil engineer, that the immediate cause of the roof being blown away was

⁹¹ BCA/13/82 (Bamenda, 12/7/1982, unreported).

attributable to the insufficient number of bolts and concrete in the original structure. That, coupled with the fact that the appellant had warned against continuing with the original structure, was enough to absolve him from any fault. The court of appeal therefore ruled that he was not liable in damages because the cause of the damage was not imputable to him.

It will also be recalled that in *Ambe John v. Brasseries du Cameroun*⁹² the plaintiff's claims for loss relating to a bank loan he had obtained to procure vehicles for the execution of a contract which the defendants had wrongfully repudiated was rejected on the grounds that he could not prove any direct link between the loan and the purchase of the lorries. Accordingly, any such losses relating to the loan could not be considered as emanating from the defendant's breach.

Causation in civil law is covered by the rule of directness which has already been discussed above. It is that damage must be, in the words of article 1151 of the Civil Code, an 'immediate and direct consequence' of the breach. The distinction between direct and indirect damage is easy to illustrate but difficult to define. The easiest way to illustrate is by referring to Pothier's famous example:⁹³ if a person sells a cow knowing that it is diseased and conceals this fact, he is guilty of fraud, making him liable not only for the loss of the cow itself but for the loss of the buyer's other animals which are infected by the disease. But he is not liable for the loss which the buyer suffers through not being able, on account of the inability to cultivate his land, to pay his debts so that his creditors levy execution on his property. As pointed out above, there are no known instances illustrating the requirement of 'directness' in contract in Civil Law Cameroon. This, it was suggested, may be due to the fact that the question is more relevant to tort than contract. Nevertheless, that requirement is firmly entrenched in the Civil Code.

⁹² *Supra*, 42

⁹³ Pothier, *Traité des Obligations* 1761, para. 166-7, cited in Treitel, *Remedies*, para. 140.

(d). Contributory Negligence.

Having considered remoteness, mitigation, and causation, one must for the sake of completion, examine contributory negligence. In the civil law, it is discussed under the heading of fault of the victim (*faute de la victime*). Whether under the civil or the common law, it refers to the situation in which the loss is partly attributable to the fault of the defendant and partly attributable to the fault of the plaintiff.

At common law the distinction between contributory negligence and the duty to mitigate is a source of some difficulty.⁹⁴ Put simply, contributory negligence can be said to be an integral part of the breach while the duty to mitigate describes a situation where the plaintiff has failed to take positive steps to avoid or limit the effects of a breach caused entirely by the defendant's faults. But it will evidently be difficult sometimes to distinguish between the two. In such cases, it has been suggested that the aim should be consistency of outcome, irrespective of which of them is adopted, so that if a farmer sows defective seeds knowing them to be defective, contributory negligence and the rules of mitigation should equally preclude recovery from crop loss.⁹⁵ At this point, one must raise the question as to whether contributory negligence applies to contractual situations at all.

Although English law has been slow to allow apportionment in contract for contributory negligence, there can now be no doubt that the English Law Reform (Contributory Negligence) Act 1945 applies in a contractual context to some extent.⁹⁶ In the recent case of *Vesta v. Butcher*,⁹⁷ Hobhouse J., sitting at first instance even went as far as laying down categories of cases for the purpose of

⁹⁴ See Bridge, *Op.cit.*, note 82, p. 403.

⁹⁵ See Hart and Honoré, *Causation in the Law*, 1985, p. 230 ("a voluntary causing of further damage... good seed being obtainable elsewhere").

⁹⁶ Newman, "The Law Reform Act 1945 and Breaches of Contract" (1990) 53 M.L.R. 201.

⁹⁷ [1986] 2 All ER 488, 508.

applying the 1945 Act to breaches of contract.⁹⁸ There is no need to enumerate and discuss them here since the act does not apply to Cameroon.

The position in Common Law Cameroon remains that of traditional common law, where the received view is that there is no common law defence of contributory negligence to a breach of contract.⁹⁹ In *Robert Njeshu Lamnyam v. Jacob Tanya Tatnem*¹⁰⁰ the Bamenda Court of Appeal was called upon to consider a bold attempt by the Nkambe Court of First Instance to recognise and apply the doctrine of contributory negligence to contractual situations. The contract involved the sale of a Toyota bus by the appellant to the respondent for 800.000 francs. The respondent took delivery of the bus upon the part payment of 200.000 francs on 12th April 1981, with the balance due in August of that same year. In May 1981, the bus was involved in an accident. It took the respondents several months to get it repaired, after which it suffered a serious mechanical breakdown, necessitating another long stay in the garage. Up until January 1982 the residue of the price had not been paid. The appellant then seized and sold it to a third party, without the knowledge, consent or authority of the respondent. The respondent brought an action in the Nkambe Court of First Instance for breach of contract and restitution (for the 200.000 francs he had already paid). The trial Magistrate held that the plaintiff was entitled to his claim for restitution of the part-payment of 200.000 francs. But he dismissed the claim for loss due to breach, notably for repairs expenses, on the grounds that the respondent had been contributorily negligent in failing to keep his own side of the contract (i.e. the payment of the balance by August 1981) and therefore could not be heard to claim any money he expended in repairing and improving a vehicle which he had not completely paid for. This was a bold attempt to extend the effect of contributory negligence to the law of contract. Yet, bold as it was, it is submitted

⁹⁸ Similar categories had earlier been proposed by Swanton, "*Contributory Negligence as a Defence to Actions for Breach of Contract*" (1981) 33 ALJ 278.

⁹⁹ Spowart Taylor, "*Contributory Negligence - A Defence to a Breach of Contract ?*" (1986) 49 M.L.R. 102, 103.

¹⁰⁰ BCA/31/83 (Bamenda, 30/3/1983, unreported).

that its attempted application to the special facts of this case was misplaced. In fact, it is not so much the result as the reasoning which is strained. So much so that on appeal, the Bamenda Court of Appeal was quick to point out that the trial court's judgement was "confusing". The Court of Appeal was not only keen to distance itself from the trial Magistrate's flirtations with the doctrine of contributory negligence, but went further to reject resolutely any application of that doctrine to contract. Delivering the unanimous judgement of the court, Anjangwe J. said:

"From the onset we wish to point out that he has introduced into the judgement notions peculiarly within the purview of the law of negligence because contributory negligence is alien to the law of contract".

The Court of Appeal did in fact reach similar results but only by employing a different reasoning. It took the view that the contract was one of sale (and not hire purchase) for which property in the bus had already passed to the respondent. The appellant therefore had no right of seizure, the proper remedy being an action for damages and balance of the contract price. Similarly, the Court of Appeal would not entertain the respondent's claims in damages relating to repairs, not because he was not entitled to undertake such repairs as the trial judge reasoned, but because he had failed to prove such expenses with the particularity that is required for specific damages. This case though, is most pertinent for the Court of Appeal ruling that contributory negligence has no place in contract.

It must however not be assumed that the plaintiff's fault is never a matter for consideration by the Cameroonian courts. Where the plaintiff is at fault, the courts may refuse to award him damages or may reduce any such award. But in such cases they have rationalized their decision in tort, not in contract, notwithstanding the fact that the action may have been founded in contract. The most glaring instance in which this approach was adopted is the case of *Alliance Trading Enterprises Ltd. v. SOCOPAO Cameroon S.A.*¹⁰¹ The respondents, (plaintiffs at first instance), had brought an action for breach of contract against the appellants. Their case was based

¹⁰¹ WCCA/2/1972 (Buea, 21-23/3/1972, unreported).

on the following facts: that while acting as customs clearing agents, they paid custom dues on the appellants' behalf for which ten Bills of Exchange were drawn by the appellant in payment thereof. That when presented, all ten were dishonoured. So they brought an action in the high court in which they claimed the amount due on the Bills of Exchange as special damages, plus an additional sum as general damages for breach of contract. The appellants (defendants at first instance) denied the claim and even set out a counter-claim of their own. The trial judge found that the appellants owed the respondent the sum claimed and gave judgement for that sum.

On appeal, the West Cameroon Court of Appeal took a completely different view of the whole case. First, it ruled that the appellants were not in breach of contract. True, the Bills of Exchange were dishonoured upon presentation to the bank but that was partly because they were presented long before they were due and partly because the appellants' account had been frozen on the instructions of the Gendarmes, who were at that time carrying out a criminal investigation of the appellants' commercial activities. There was no evidence that any of the Bills of Exchange were later presented (and then dishonoured) on the due date or after the appellants' account had been unfrozen. In the absence of such evidence, the Court of Appeal concluded that no breach of contract had been committed by the appellants. Further, the reason why the appellants suffered criminal investigations during which some of their directors were detained was because of certain irregularities found in their customs declarations. The appellants also incurred fines as a result of that. These declarations were made by the respondents on behalf of the appellants in their capacity as customs clearing agents and although the information had been provided by the appellants, the court was satisfied that the appellants had not furnished the respondent with any wrong or false information concerning their activities. In effect, whatever it was on the custom declarations that provoked the intervention of the Gendarmes, was caused by the respondents fault or negligence. From this the court noted that neither the non-payment of the Bills of Exchange nor the damage suffered by the appellants would have occurred had the respondents not made errors on the custom forms. Summarising its position, the court, albeit admitting that this was a

contractual relationship, employed language redolent of judgements in tort actions:

"It is clear that the contract existed between the appellant and the respondent whereby the respondent agreed to be the customs clearing agent for the appellants, for remuneration. By the very nature of the customs clearing business it is one which is highly specialised and the appellant was rightly entitled to rely upon the skill and diligence of the respondent. If, therefore, such a specialised agent acts negligently to the detriment of its principal, the agent is liable to its principal for damages resulting from that negligence. Thus the respondent is liable ...in negligence to the appellants for its actions in making wrong entries on the ...forms."

On the question of damages, the court held that the appellants' claims based on the fines they paid as a result of such wrong entries were not foreseeable and therefore too remote. One is bound to disagree with the court on this particular point. It is common knowledge that the Department of Customs and Excise punishes wrong entries on custom forms with fines, so how could the court say that any loss resulting from such fines is unforeseeable and too remote. It was also held that "the intervention of the Gendarmes should be treated as a *novus actus interveniens*". This too is hardly any more convincing. Perhaps the court had become oblivious of the fact that this really was an action in contract, not tort. However, the appellants were awarded general damages for negligence and the High Court award against them was set aside.

This case reveals that the common law courts in Cameroon still steadfastly refuse to entertain the application of the doctrine of contributory negligence to contractual situations. But in order not to let off a plaintiff who may be guilty of fault, they have resorted to a subtle imposition of a tortious interpretation on an essentially contractual situation. So much the better if, as in the present case, it leads to the plaintiff's fault being taken into account. The problem, however, is that this is a subtle and concealed technique and as such it may be unreliable, except in sophisticated hands.

It is strongly submitted that the courts in Common Law would do well to formally recognize or extend the application of the principle of contributory negligence to certain breaches of contract. In the case above, even though the panel was made of very experienced judges, their task was nonetheless made easier by the fact that the

respondents' liability in contract was about the same as his liability in the tort of negligence independently of the existence of any contract. In such a case, contributory negligence can easily be applied, as the court did, as if the action was one for negligence.

Sometimes though, liability arising from a contractual obligation may be expressed in terms of taking care but may not correspond to a common law duty to take care which would exist in the given case independent of contract. It is in situations like that the application of contributory negligence becomes necessary, not least to avoid the iniquitous situation whereby the negligent plaintiff can avoid his partial liability by electing to sue in contract rather than in tort. Because a Cameroonian Common Law court is handicapped by its inability to hold the plaintiff liable for contributory negligence, and because no duty of care exists in tort independent of the contract, the ingenious negligent plaintiff in such a case may not be held to account for his negligence. Even the first instance judgement by the Buea High Court in the *Alliance Trading* case, serves to underline this point. It will be recalled that at that level the respondent was awarded his full claim, notwithstanding the trial judge's finding that he was at fault and that such fault had led to all the problems that both parties had faced - the respondent not getting paid on the Bills of Exchange and the appellants' directors being fined and incarcerated by the Gendarmes. It can only be presumed that the trial judge was unable to take account of the respondents' fault because the law allowed him no access to the doctrine of contributory negligence in contractual actions. The Court of Appeal only managed to redress the situation by treating the case as though it was based on negligence. As things stand, whether or not a plaintiff is liable for contributory negligence very much depends on the capacity or the ability of a judge to import a tortious interpretation to contractual situations. As this is of a subtle and indirect nature, it is not unlikely that in the lower courts the results may not always be as fair as those which an appellate court might reach. For the sake of predictability and fairness in results, the principle of contributory negligence must be extended to some contractual situations. There is hardly any doubt that the reason for its absence at the moment is historical, precisely because the common law and

statute law in Common Law Cameroon is limited to pre-1900 English cases and pre-1900 English statutes of general application. It is for this reason that the English Law Reform (Contributory Negligence) Act 1945 does not apply to Cameroon. It is suggested that the best way to sanction or extend the doctrine of contributory negligence to the law of contract in Common Law Cameroon is by legislation.

In **Civil Law Cameroon**, the Civil Code contains no provision expressing a doctrine of contributory negligence but the courts have adopted the notion of "*fait ou faute de la victime*" (act or fault of the victim) developed by French courts which serves the same purpose as contributory negligence. It is to the effect that if the loss is due to the act or fault of the victim the liability of the defendant may be extinguished or attenuated. It is extinguished if the act of the victim is said to be the sole cause of the loss, and attenuated if the fault of both parties has contributed to the loss.¹⁰² In the latter case there is sometimes said to be common fault (*faute commune*),¹⁰³ the effect of which is that the plaintiff's damages will be reduced in proportion to the degree for the loss.¹⁰⁴ There is much controversy though as to the exact basis of reduction in French law.¹⁰⁵

The notion of fault of the victim was applied by the Yaounde *Tribunal de Grande Instance* in *Affaire Société SIGMA 2000*.¹⁰⁶ It will be recalled in that case that the plaintiff was commissioned to build a house for the defendant. It was a term of the contract that there would be penalties for delay. After completion the defendant refused to accept delivery and pay the balance of the price for the construction work because of certain defects. The plaintiffs agreed that the cost of correcting the defects should be set-off against the balance they were due, but the defendant still refused to

¹⁰² Marty and Raynaud II paras. 497-8.

¹⁰³ Mazeaud, *Traité* II para. 1505.

¹⁰⁴ Mazeaud, *Leçons* II 1 para. 594, 598.

¹⁰⁵ Mazeaud, *Traite* II para. 1509 ff.

¹⁰⁶ *Supra*, note 78.

pay the balance and take over the house. In an action by the plaintiffs (the builder) the defendant argued that plaintiffs were guilty of delay and sought to invoke the penalty for delay clause. It was held:

"Qu'il en decoule que le retards constaté dans l'exécution du marché et dans la livraison de la villa lui est en grande partie imputable; Qu'il convient de le débouter de sa demande de ce chef."

That is to say, the delay was largely due to the conduct of the defendant, therefore, his claim for penalty damages based on the delay must fail. So Civil Law Cameroon, even in the absence of statutory provisions, has a much more direct approach to contributory negligence than the Common Law part.

(e). *Mise en Demeure*.

Literally, this means "put in delay" but I shall refer to it here as "notice of default". Under French law, a defaulting party is entitled to a "*mise en demeure*", that is, be reminded unequivocally by way of notice that performance is already due, before any action for non-performance is taken. It is the responsibility of the creditor to serve the creditor with a notice of default. As this is exclusively a civil law procedure, every bit of discussion under this head relates only to Civil Law Cameroon.

Strictly speaking, *mise en demeure* is not a limitation on damages in the sense that it does not determine the amount of damages that the plaintiff can claim or is entitled to. But it is relevant to an action in damages because it determines the time at which damages begin to run. Legislative basis for this can be found in article 1146 of the Civil Code, which provides that damages are not due until the debtor is in default.

According to article 1139 of the Code, the debtor is put in default either by a summons (*sommation*) or other equivalent act; or by the effect of an agreement dispensing with the need for a notice and by the simple lapse of time. A *sommation* is a formal notice demanding performance and served through a *huissier*. What constitutes the "other equivalent act" is a question of fact and therefore within the *pouvoir souverain* of the trial judge. In France this has been held to include acts as

different as the issue of a writ or the sending of a letter.¹⁰⁷ The same is true of Cameroon where in *Affaire Dieye Assane v. Société Immobilier Camerounais*,¹⁰⁸ an *assignation en référé* (a writ for an action to be heard in chambers) was held to amount to a *mise en demeure* even though the parties themselves had earlier agreed that any *mise en demeure* would be served by registered mail. It can thus be said that the courts in France and Cameroon adopt a liberal approach as to what constitutes *mise en demeure*. It need not always be formal. This flexibility, it must be said, makes much sense, particularly in Cameroon. In the first place, however informal the notice may be, the crucial question should be whether or not it serves its purpose of putting the debtor on notice and in no doubt that the creditor is expecting performance. If it does, the lack of formality alone should not invalidate it. Secondly, it would be impractical, not to say insensitive, for Cameroonian courts to insist on only formal notices served by *huissiers*. In the preceding chapter, it was said that one main obstacle to formality in contracts is the very absence of legal practitioners in all parts of the country. That same argument readily fits here.

Since the purpose of *mise en demeure* is to impress on the debtor that performance is long over due, it is in principle relevant to other remedies which may follow non-performance.¹⁰⁹ This relevance is underlined by the fact that the creditor's silence in the matter may be regarded as an accommodation of the delay. That was exactly the case in *Affaire Mbomiko Ibrahim v. Soitacam*,¹¹⁰ where the appellant's failure to complain or serve the respondents with a notice of default after the latter had failed to complete the performance of the contract within the four months dateline, was considered as an acquiescence in that delay by the appellant. However, the pre-

¹⁰⁷ Cass civ 31.3.1971, D 1971 Somm 131. For a review of case law, see Simon J-Cl Civ, arts 1146-1155, fasc VIII, cah I, s. 42.

¹⁰⁸ *Arret No. 53 du 23 Mai 1972*, (1972) no.26 B.A.C.S, 3627.

¹⁰⁹ In particular, in those cases in which rescission is permitted without recourse to the courts e.g. *Affaire Ondoua*, *infra*. But it will be seen in section 3 below that *mise en demeure* is not required for the defence of *exceptio non adimpleti contractus*.

¹¹⁰ *Infra*, note 177.

eminent function of *mise en demeure* is to fix the date from which remedies will run¹¹¹ and to cause the risk to pass in a sale or similar contract.¹¹²

At this juncture it must be pointed out that even in an action for damages, the requirement of *mise en demeure* is not absolute. Article 1146 itself specifies that it is not necessary in cases in which the nature of the obligation is such that it can only be performed within a certain time and that time has elapsed. There are also other situations in which *jurisprudence* dispenses with *mise en demeure*. One such example is to be found in *Affaire Arribas v. Fadel Ahmed*¹¹³ in which the Supreme Court, following in the footsteps of the French *Cour de Cassation*,¹¹⁴ held that *mise en demeure* is not necessary in the case where a party commits a quasi-delict in the execution of the contract by delivering or providing an object with hidden defects. In that case, the respondent had acted expeditiously by hiring a third party to remedy defects in the roofing of a building which the appellants had constructed for him. He had to do so in order to forestall the damage that water leaking from the roof was causing to his tenants. After the repairs had been effected, he claimed the full costs of repairs from the appellants. It was held that he was entitled to reimbursement from the appellants. They appealed, contending amongst other things, that the respondent could not succeed because there had been no *mise en demeure* from him. The Supreme Court dismissed that appeal for the reason already given above.

The Supreme Court has also held in *CFAO v. Ndamako Ahmadou*¹¹⁵ that *mise en demeure* is not required in the case where the non-performance of a contract for fixed term is due to the *faute* or *dol* of the debtor. In that case, the appellant had still not delivered a car the respondent had bought from him three years after the supposed

¹¹¹ Article 1146.

¹¹² Article 1302 Civil Code.

¹¹³ Arrêt du 14 Août 1980, (1980) No. 19 & 20 Rev. Cam. Dr., 79.

¹¹⁴ The following decisions of the *Cour de Cassation* were specifically cited: Cass civ. 25 Janvier 1904 D. 1904.1.239; Cass. Reg. 31 Oct. 1905 D.P. 1907.1.135.

¹¹⁵ Arrêt No. 13 du 15 Dec. 1977 (1978) No. 38 B.A.C.S. 5646.

date of delivery. The respondent then brought a successful action for a refund of the advance payment plus damages for breach of contract. On appeal to the Supreme Court, one of the appellant's main contention was that there had been no *mise en demeure* from the respondent. This was rejected by the Supreme Court in the following words:

"Attendu qu'au surplus la mise en demeure n'est plus requise en cas d'inexécution fautive ou dolosive d'une obligation fixée à terme, comme c'est le cas en l'espèce".

Although the court did not mention article 1146 of the Code, this decision clearly echoes the second limb of that article which is to the effect that where the contract is for a specified duration and the time for performance has passed, *mise en demeure* is no longer required.

8.2. SPECIFIC PERFORMANCE.

The remedy of an action in damages despite being the primary remedy at common law, is not always necessarily the best remedy. In some cases specific performance may seem the only sure way to satisfy the aggrieved party. Besides, it may also have the advantage over damages in that it often minimizes the risk of error in damage assessment.¹¹⁶ In the civil law, it has already been stated that an action for performance is the primary remedy. The aim of this section is to consider the general principles upon which specific performance may be granted under both systems.

(1). Specific Performance under the Common Law.

At common law, specific performance is a decree issued by the court ordering the defendant to carry out his contractual obligation. Failure to comply constitutes a

¹¹⁶ This consideration is developed in detail in economic terms by Kronman, "Specific Performance" (1978) U.Ch.L.Rev. 351

contempt of court which may be punished by fine or imprisonment. The latter is a drastic recourse, which it seems, is rarely adopted for cases of contempt involving ordinary contracts. This is demonstrated by the case of *Fon E.F. Njifonuh II v. Emens Textiles International*.¹¹⁷ The defendants, in deliberate defiance of a court order, refused to vacate the premises of the plaintiff which they had been occupying as commercial tenants. Despite this flagrant contempt, the court did not at all consider contempt proceedings, preferring instead to award damages for part of the extra period of time that the defendants occupied the premises after the decreed date for vacation.

One peculiar and rather regrettable feature regarding the enforcement of performance in Cameroon deserves some mention here. It is to do with the Police and Gendarmes. Sadly, some people believe that it is the duty of the Police to enforce contracts, a belief that is perpetrated by the Police themselves by their constant readiness to interfere in the private affairs of private individuals. It is therefore not uncommon for the Police to arrest and detain a party to a contract for an alleged breach of contract. This is eerily illustrated by *Jonas Puwo v. Ndi Cho Samson*.¹¹⁸ The plaintiff had ordered and paid for a gear box for a Mercedes truck from the defendant. It was in fact supplied but the plaintiff claimed it was the wrong model while the defendant contested it. Instead of taking the matter to a proper court of law for adjudication, the plaintiff opted for the dreaded *Brigade Mixte Mobile* (the state security Police or a Cameroonian *stassi*), better known as BMM. The defendant was incarcerated and, he claimed, tortured in attempt to coerce him into repaying all of the contract price. It is difficult to dismiss the appellants allegations of torture, bearing in mind that in a recent application for *habeas corpus*, Fombe J., with doughty sincerity, described the BMM cell as "a place where God is unknown and

¹¹⁷ HCB/24/68 (Bamenda, 5/2/1971, unreported).

¹¹⁸ HCB/31/83 (Bamenda, 12/9/1984, unreported).

Satan reigns therein."¹¹⁹ The defendant somehow managed to stand his ground and only then did the plaintiff think of bringing a High Court action. It must be stressed that the law courts are generally not involved in this the kind of unfortunate practice just described. I have mentioned it here only to bring it to light. The Police must desist from such practices, not least because it undermines the due process of law. Fortunately, this is not part of the common law on specific performance, to which I now revert.

Specific performance is an equitable remedy developed by the Court of Chancery in England as an alternative to the common law remedy of damages, where the latter was considered to be inadequate or unfair.¹²⁰ Its availability is thus a matter for the discretion of the court; no plaintiff is entitled to it as of right. But the danger of uncertainty that comes with discretion led the courts both to enunciate guidelines or principles to constrain the exercise of discretion and to classify those contracts for which typically specific performance will or will not be granted. The discussion is divided accordingly.

(a). Principles for the Exercise of Discretion.

I shall discuss what are considered to be the three main principles.¹²¹ According to traditional doctrine, the plaintiff must show that damages would be an 'inadequate' remedy. Such may be the case where what is promised is 'unique'. So, if the plaintiff attributes to the contractual promise a subjective value which significantly

¹¹⁹ In *Retired Justice Nyo Wakai & 172 Others v. The People* HCB/19CRM/92. For more on that case, see comment by Muna C. in *Le Monde Judiciaire* (1993) Jan.-Mars, p.27.

¹²⁰ See generally I.C.F. Spry: **Equitable Remedies**, 4th edn., 1990, p. 58 and Sharpe, "Specific Relief for Breach of Contract" In: Reiter, and Swan, eds., **Studies in Contract Law**, 1980, chapter 5. For a brief historical excursus, see Jones and Goodhart: **Specific Performance**, 1986, p.3.

¹²¹ For a more comprehensive discussion, see Jones and Goodhart, *Op. cit.*, note 120, who treat eight altogether.

exceeds its market value, specific performance may well be appropriate.¹²²

The second set of principles reflects traditional equitable concerns with justice and fairness. English courts have, for instance, refused to grant specific performance where the cost of performance was out of all proportion to the benefit that would have accrued to the defendant,¹²³ and where the plaintiff had acted unfairly in the performance of his obligations.¹²⁴ Under this head, one may include the so-called mutuality principle. Fry elaborated on this principle¹²⁵ but the accuracy of his statement that as a general rule, a contract must be mutual in order to be specifically enforced has not only been seriously questioned, but was effectively rejected in the English case of *Price v. Strange*.¹²⁶ In that case, the trial judge had refused to grant specific performance on the ground that the contract was not capable of mutual enforcement when it was made. The Court of Appeal reversed that decision and ordered specific performance. Fry's statement of law was said to be unsupported by the authorities and wrong in principle.

The third set of principles relate to practical considerations. The most obvious example is the assumed difficulty and expense of supervision. This points to what Zweigert and Kötz¹²⁷ diagnose as the main obstacle to the grant of specific performance in common law jurisdictions: the fact that its implementation remains the subject of loose discretionary procedures, with little law to distinguish types of claim and lay down and establish particular coercive techniques for their enforcement.

¹²² Harris, Ogus, and Phillips, *Op. cit.*, note 62, 589-94; Muris, "Cost of Completion or Diminution in the Market Value: The Relevance of Subjective Value" (1983) 12 J. Leg. Stud. 379.

¹²³ *Tito v. Waddell* [1977] Ch. 106. See also *Wroth v. Tyler* [1974] Ch. 30.

¹²⁴ *Shell U.K. Ltd. v. Lostock Garages* [1976] 1 WLR 1187.

¹²⁵ Fry, *Specific Performance*, 6th edn. pp. 222-223.

¹²⁶ [1978] Ch. 337.

¹²⁷ Zweigert and Kötz: *An Introduction to Comparative Law*, (tr. Weir, 1977), Vol.II, pp. 155-158.

It is clear from the cases that the courts in Common Law Cameroon generally apply the above principles, especially the first two, when deciding whether or not to grant specific performance. The case of *Anye Fambo Paul v. Ruben Anusi & Oumarou Abbu Mallam*¹²⁸ is a good example. The plaintiff lent money to the first defendant, while the second defendant stood surety. The second defendant offered a piece of land belonging to him as security for the repayment of the loan. The first defendant defaulted in the repayment of the loan and the plaintiff sued for the amount owing or in the alternative for an order of enforcement of the deed of prescription. It was held he was entitled to the whole amount he loaned plus damages and costs, but no more. On the alternative claim, Epie J. reached a decision which re-emphasised the equitable, and discretionary, nature of specific performance:

"To order enforcement of the deed of prescription would be tantamount to making an order of specific performance of that particular term of the contract of guarantee relating to the land. It is my considered opinion that any such orders would offend against the principles of natural justice, equity and good conscience. A decree of specific performance is an equitable remedy issued by the court in the exercise of its equitable jurisdiction. The discretion is ...exercised on well settled principles. The court must take into account the hardship which an order of specific performance would inflict on the defendant. Again, jurisdiction in specific performance is based on the adequacy of the remedy at law and so it follows as a general principle that equity will not interfere where damages at law will give a party the full compensation to which he is entitled and will put him in a position as beneficial to him as if the agreement had been specifically performed."

Specific performance was also denied in *Mukoro Stephen v. Texaco Cameroon*.¹²⁹ The appellant agreed to lease his land to the respondents for the construction of a petrol garage and in return the respondent promised to appoint him to manage the said garage. As a result of that promise, the appellant accepted rents that were substantially below the market value. When the construction of the garage was completed, the respondents appointed a third party to manage it, much to the

¹²⁸ HCB/90/89 (Bamenda, 6/8/1990, unreported)

¹²⁹ BCA/47/84 (Bamenda, 13/5/1985, unreported).

consternation of the appellant, who as immediately brought an action for specific performance against the respondents. The Bamenda High Court rejected his claim for specific performance. In upholding that decision, the Bamenda Court of Appeal re-emphasised the point that "The fundamental rule is that specific performance will not be ordered if there is an adequate remedy of law." In recognition of the fact that the appellant had accepted such low rents on the clear understanding that he was to run the petrol garage, the Court of Appeal awarded him damages to make up for the shortfall. One is tempted to say that the award of damages was inadequate in this case. In the first place, it would not be wrong to say that what the plaintiff bargained for was 'unique', especially as they could not have been that many petrol garages in the entire Bamenda urban area at the time. Even more significantly, it is doubtful whether the plaintiff would have permitted the construction of a petrol garage on his land if he had not been promised, and did not believe, that he was to manage it. It is therefore submitted that on the facts of this case, a decree of specific performance would have been more appropriate than an award in damages.

But it is not always that a claim for specific performance is denied. In *D. A. Nangah v. A. T. Asonganyi*,¹³⁰ the defendant sold his property at the Commercial Avenue Bamenda to the plaintiff. The agreed price was 10.150.000 francs. Of this amount, 3.000.000 francs was immediately paid, with the balance due on the completion of the deed of conveyance. When the deed of conveyance was finally prepared, the defendant refused to sign it and insisted on cancelling the contract of sale. The plaintiff brought an action for specific performance. Citing the English cases of *Hutton v. Watling*,¹³¹ and *Harnett v. Yielding*,¹³² the court reiterated the principles that specific performance is based on the inadequacy of the remedy at law and that equity will not interfere where damages will fully compensate a party and put him in as good a position as if the contract had been performed. Having reviewed

¹³⁰ HCB/79/85 (Bamenda, 29/1/1987, unreported).

¹³¹ [1948] Ch. 25.

¹³² (1805) 2 Sd & Hef 549, 552.

the guidelines, the court went on to hold that in the instant case, the plaintiff could not be adequately compensated by an award of damages "because this being a contract for the sale of land which land is situated at the Commercial Avenue Bamenda, it definitely has a peculiar value to the plaintiff."

Specific performance was again granted in another case involving land. In *Ofon Thomas v. Ejiohu Cyprien*,¹³³ the appellant, a sawyer, borrowed the sum of 1.519.000 francs CFA from the respondent in April 1986. It was a condition of the loan agreement that if it was not repaid either in cash or in timber's worth on or before 31st August 1986, the respondent was to own the appellant's piece of land situated at Strangers' Quarters, Muyuka. The loan was still unpaid either in cash or in kind after the dateline, and in an action by the respondent, the Muyuka Magistrate Court held that he was entitled to take over the land that was offered as security of the loan. An order for the specific performance was thus decreed. This was confirmed on appeal but this time the Court of Appeal did not bother to say whether specific performance was granted because an award of damages was deemed inadequate or because of the special value of land. It might be thought that, like the *Anye Fambo case* above, the remedy of damages plus the full amount of the loan would have been adequate. But I suppose one cannot expect uniformity of results even on similar facts when so much rests on the discretion of the judges.

For the sake of completeness, one other form of specific relief, analogous to specific performance, ought to be mentioned. It involves the enforcement of agreements for the payment of money, typically the contract price. Unlike specific performance, this is not a discretionary remedy. Such a situation arose in *Scholastica Nsaiboti v. Felix Ezeafor*.¹³⁴ On April 15th 1971, the appellant bought a car from the respondent and paid about a third of the price, with the balance due after six weeks. Then on April 19, she wrote to the respondent purporting to rescind the contract. Although she made allegations as to breaches of conditions and warranties,

¹³³ CASWP/27/88 (Buea, 23/11/1989, unreported).

¹³⁴ BCA/6/73 (Bamenda, 14/3/1974, unreported).

it was clear beyond doubt that the reason she wanted out of the contract was because of her impecuniosity. This was evident in her letter to the defendant in which she complained about being unable to raise the balance within a year, never mind within six weeks. The respondent would have none of that and sued for the balance. The Bamenda High Court held that he was entitled to succeed, a decision that was upheld on appeal.

(b). Contract-Types.

For the purpose of granting the remedy of specific performance, the courts have not adopted any rigid classification of contract-types. Nevertheless, some categories of contract so regularly import features that are relevant to the principles described above. Thus, in England, specific performance is typically available for sale of unique goods, sale of real property and contracts conferring benefits on third parties. Conversely, contracts of employment and for services¹³⁵ and building contracts are rarely specifically enforced.

In Cameroon one will need more cases than there are at the moment in order to determine whether there are special contracts for which specific performance is more likely to be granted. In the *Nangah* case,¹³⁶ Ndoping J. said that:

"The commonest case in which the court specifically enforces a contract is where the contract is for the sale of land or for the granting of a lease. Contracts relating to land differ greatly from contracts respecting goods because they may have a peculiar value to the purchaser or lessee."

It would appear from the above that Cameroonian courts follow the practice in England in according special treatment to contracts relating to the sale of land or real

¹³⁵ See the English *Trade Union and Labour Relations Act 1974*, s. 16. In cases of unfair dismissal, an industrial tribunal has the power to recommend reinstatement but there is no power to enforce this if the recommendation is not implemented by the employer.

¹³⁶ *Supra*, note 130

estate.

Before one leaves this discussion on specific performance under the common law, one should refer to the recent trend in England and America whereby the courts, while still maintaining the traditional line that damages must be shown to be inadequate, are nevertheless adopting a much more flexible attitude on the matter by showing a greater readiness to grant specific performance.¹³⁷ Sir Robert Megarry VC, for instance, has thought it appropriate to inquire whether specific performance "will do more perfect and complete justice than an award of damages".¹³⁸ And in America, it has been suggested that the remedy of specific performance should be as routinely available as the damages remedy.¹³⁹

Such developments cannot be said to be taking place in Cameroon. The courts still stick closely to the traditional principles and if anything, are slightly more predisposed to refuse rather than grant specific performance. There is no necessary cause for criticism in this conservative approach though. The kind of complex market arrangements for which it is said specific performance is a superior remedy are not commonplace in Cameroon. Likewise, there are few contracts for which it has been argued that long term business interests (the so-called 'relational' view of the contracting relationship)¹⁴⁰ depend on performance. Instead the vast majority of contracts are either personal service contracts or involve close personal relationships.

¹³⁷ See for instance, Van Hecke, "Changing in Specific Performance" (1961) 41 North Carolina L.R. 1; Sharpe, *Op. cit.*, 120, 130-132; Linzer, "On the Amorality of Contract Remedies: Efficiency, Equity and the Second Restatement" (1981) 81 Col. L.R. 111; and Burrows, "Specific Performance at the Crossroads" (1984) 4 Leg. Stud. 102.

¹³⁸ *Tito v. Waddell* [1977] Ch. 106, 322; For an account of US developments which are even more pronounced in their flexibility, see Linzer, *Op. cit.*, note 137, 126-130.

¹³⁹ Schwartz, "The Case for Specific Performance" (1979/80) 89 Yale L.J. 271.

¹⁴⁰ Mcneil, "Contracts: Adjustment of Long-term Economic Relations" (1978) 72 NW U.L.R. 854; Macaulay, "Non-contractual Relations in Business" (1963) 28 Am. Soc. R. 55.

In such situations, it would be insensitive for the courts to force a continuing relationship on the parties. This is not to suggest, however, that the courts should abandon the remedy of specific performance altogether. Where all indications point to that remedy, the courts should not feel constrained even by the alleged difficulties of supervision to prescribe it. Such difficulties which were more pertinent during the era of the struggle between the courts of law and courts of equity in England,¹⁴¹ are now believed to be exaggerated.¹⁴² And because Cameroon has never had separate court structures for common law and equity, it will be out of place to even raise such concerns.

(2). Exécution Forcée under Civil Law.

(a). The Nature of the Remedy.

It has already been said that French law is committed to the notion that the primary objective is performance of the contract. French legal writing refers more frequently to performance in kind (*exécution en nature*) than to enforced performance (*exécution forcée*) but what is important is that if the creditor cannot obtain the former, the law will if necessary enforce performance. The same is true of Civil Law Cameroon.

Two provisions of the Civil Code, articles 1143 and 1144, envisage particular forms of enforced performance which have the advantage of acting as security for the

¹⁴¹ A notable example of this conflict is *Glanville's Case* (1614) Moore K.B. 838, 72 E.R. 939, where the Chancellor issued an injunction against the execution of a common law judgement except upon equitable terms, the plaintiff being jailed for his contempt in refusing to obey the injunction, and then released by the common law courts on *habeas corpus*.

For a general discussion of this conflict, see Holdsworth, *A History of English Law*, 1956, pp. 461-5.

¹⁴² See dicta by Megarry VC in *Tito v. Waddell* [1977] Ch. 106, 321-2 and Lord Wilberforce in *Shiloh Spinners v. Harding* [1973] A.C. 691, 724.

creditor without compelling a recalcitrant debtor to do anything other than pay a monetary sum. In the case of an obligation *de ne pas faire*, article 1143 empowers the judge to order, at the debtor's expense, the destruction of that which was done in contravention of the agreement: for example, the destruction of structures built without the landlord's consent. There is no known actual application of article 1143 in Cameroon and doubt must occur whether the courts will not hesitate to order the destruction of a house the construction of which infringed the rights (proprietary or contractual) of another. In France, for example, the courts have consistently refused to order reinstatement of wrongfully dismissed employees, no doubt because of the practical difficulties involved in such enforcement.¹⁴³

Where an obligation concerns an obligation *de faire*, article 1144 permits the creditor to have the contract performed at the debtor's expense. In *Affaire Arribas v. Fadel Ahmed*,¹⁴⁴ the parties concluded a contract in which the appellant (building contractors) agreed to construct two further floors on an existing building belonging to the respondent. Upon completion the owner let out the new apartments to tenants. Then, due to a defective drainage system put in place by the contractors these apartments suffered flooding, causing damage to the occupants. The contractors failed to respond to the owner's demand for repairs, so in a bid to halt any further damage, he engaged another contractor to effect the necessary repairs. When that had been done, the respondent brought an action against the appellants for the costs of the repair work. It was held by the Supreme Court, affirming the decision of the lower courts, that on the strength of article 1144 the respondent must succeed in his claim for reimbursement for repair expenses from the appellant.

For practical purposes, these two instances (arts. 1143 and 1144), although considered as instances of enforced performance, differ little from the award of damages: the creditor still has to obtain payment from the debtor. The disadvantage

¹⁴³ Cass. soc. 14 Juin 1972, D. 1973, 114, note N.Catala; JCP 1972.II. 17275, note G. Lyon-Caen.

¹⁴⁴ CS Arrêt du 14 Août 1980, (1980) No.19 & 20 Rev. Cam. Dr. 79.

here is that the creditor has to provide the capital for the undertaking before he is reimbursed by the debtor. On the other hand, the creditor does not have to show loss in order to invoke either procedure. This rule was firmly laid down in a French case¹⁴⁵ where a party to a building scheme had sought its demolition because the building put up had exceeded the limits agreed in the scheme. The court below refused to authorise the demolition on the grounds that plaintiff had shown no *préjudice*. The *Cour de Cassation* quashed that decision, pointing out the plaintiff does not have to show any damage.

It should be noted that these two procedures involve judicial authorization. The plaintiff cannot act on his own initiative, except in cases governed by commercial law, where commercial custom may authorize the creditor to exploit a right of replacement or where a notice (*mise en demeure*) may be sufficient. A court order may also be dispensed with in cases of great urgency. In *Affaire Arribas* (*supra*), one of the debtor's main grounds of appeal was that the creditor had not obtained a court order before embarking on repairs. To buttress this argument, he cited a decision of the French *Cour de Cassation*.¹⁴⁶ The Supreme Court responded by declaring that judicial authorization is not always necessary and gave as an example, a house-letting lease where the tenant may, without a court order, carry out repairs and still claim reimbursement from the landlord on condition that he establishes,

"d'une part, que ces travaux étaient indispensables pour permettre l'usage de la chose louée et, d'autre part, que la dépense n'excède pas celle qui eut été effectuée en y procédant de la façon la plus économique"

That is to say the creditor must prove that the work or repairs carried out was vital and that he used the most cost effective method in doing so. The Supreme Court felt that this case was clearly covered by the urgency exception and as such a court order was not necessary. Judicial control may intervene only *ex poste*, in the event of an

¹⁴⁵ Cass civ 17.12.1963, JCP 1964.II.13609 note Blaevoert, Gaz. Pal. 1964.1.158.

¹⁴⁶ Cass. Civ. 5.6.53 D.1955, 61.

improper exploitation of the right.¹⁴⁷ It should be noted that in arriving at this conclusion, the Supreme Court also relied heavily on decisions of the *Cour de Cassation*.¹⁴⁸

The pre-eminence of the remedy of performance that has already been mentioned above should not, however, be exaggerated. It is not reflected in any legislative provisions since article 1184, the only general provision which refers to the three remedies does not give it any priority, conferring instead a free choice on the creditor, "either to compel the other to perform ... or to claim rescission with damages".

Further, article 1142 of the Civil Code which prescribes that "every obligation *de faire* or *de ne pas faire* gives rise to damages in the event of breach by the debtor" seems to considerably limit the role of specific performance. Taken literally, the provision asserts a principle denying specific performance except in the cases envisaged in articles 1143 and 1144. In reality, the provision is confusing. As regards obligations *de faire*, articles 1143 itself undermines the terms of article 1142 and in relation to obligations *de ne pas faire*, judicial interpretation has largely transformed the obvious meaning of the text.¹⁴⁹ Doctrine generally concludes that article 1142 is badly formulated. It takes the form of a general rule, but applies only to the limited category of personal contracts. One commentator has said,

"The least that one can say of article 1142 is that it was very badly drafted. It presents an imperative rule which is no more than an option, though, it is true, the statistically predominant one."¹⁵⁰

¹⁴⁷ Substitution is sometimes regarded as a form of unilateral automatic rescission. See Le Tourneau, *La Responsabilité Civile*, 1982, para. 1762.

¹⁴⁸ Cass. Civ. 9 juillet 1945 D. 1946 Somm. 4; Civ. sect. civ. 19 juillet 1950 D. 1950 Somm. 3; Civ. sect. soc. 7 déc. 1951 D. 1952. 144).

¹⁴⁹ See Jeandidier, "*L'Exécution Forcée des Obligations Contractuelles de Faire*" R.T.D.C. 1976, 700ff.

¹⁵⁰ See note to Cass. civ. 19.2.1970, Gaz. Pal. 1970.1.282.

Article 1142 recalls, or rather, is the result¹⁵¹ of the maxim *nemo praecise cogi potest ad factum* (no-one can be compelled to a specific act). And this "invasion" of specific performance¹⁵² overturned the principle to be found in article 1184: the creditor may force the other party to perform "where this is possible". Everything thus turns on this notion of impossibility or *impossibilium nulla obligatio*. First, there is physical impossibility, for example, where the subject-matter of the sale has been resold and the third party has acquired it in good faith.¹⁵³ Then there is the case of moral impossibility: enforced performance involves compulsion on the debtor which is morally unacceptable. It is said that this "expresses the libertarian repugnance to compulsion directed against the person".¹⁵⁴ The most frequently encountered examples concern artists who cannot be compelled to furnish a work of art or undertake some artistic activity. It was thus held in the famous *Whistler Case*¹⁵⁵ that a painter cannot be forced to paint a portrait or to deliver one which he regards as unsuccessful. There does not appear to have been any cases on impossibility, physical or moral, in Cameroon. This, one suspects, is largely due to the fact that many creditors prefer to take up the option provided by article 1142, in other words, sue for damages rather than insist on performance.

Specific performance is also handicapped by the limited enforcement powers of the judge under the civil law. Contempt of court as known to the common lawyer does not exist in French law and in Civil Law Cameroon, and in the case of France physical compulsion (imprisonment for debt) for civil purposes was abolished in

¹⁵¹ Weill & Terré, para. 831.

¹⁵² The expression is that of Jeandidier, *Op. cit.*, note 149, no. 7.

¹⁵³ For a discussion of the rule that the *objet* must be possible and the common law analogy, see Nicholas, "Rules and Terms - Civil Law and Common Law" (1974) Tul.L.R. 966.

¹⁵⁴ Nicholas, p. 210, citing Pothier *Vente* s.68; *Louage* s.68.

¹⁵⁵ Cass. civ., 14 Mar 1900, D. 1900. 1. 497.

1867.¹⁵⁶ The courts, however, have developed ways of enabling the creditor to obtain the requisite performance from the debtor without using physical compulsion. The most important one is the *astreinte*.

(b). *Astreintes*.

I shall only outline the principal characteristics of the *astreinte* here.¹⁵⁷ The *astreinte* is a device imposed by the judge to support an order of specific performance, as a result of which the debtor who fails to perform must pay a substantial sum to the creditor for each day, week or month of delay, or even for each breach of an obligation *de ne pas faire*.¹⁵⁸ It has a deterrent function in that it impels the debtor to perform voluntarily rather than pay an amount which may not only be substantial but also increases in proportion to his contumacy. The *astreinte* may be *provisoire* (provisional), implying that the judge will liquidate the sum after the end of the period, or *définitive* (final), in which case the judge cannot modify the amount at the end of the period. The *astreinte* is a judicial development and for a long while it was countenanced entirely by judicial practice. It was not until 1972 that it gained legislative support in France with the passing of the Law of 5 July 1972.¹⁵⁹

The *astreinte* is used by the courts in Civil Law Cameroon even though it has no legislative expression in Cameroon. In *Société Sigma 2000 v. Nguedia Albert*,¹⁶⁰

¹⁵⁶ Tallon, "Remedies: French Report" In: Harris and Tallon, p. 267.

¹⁵⁷ For a detailed analysis of the rules, see J. Boré, *Ency. Dalloz, Droit Civil*, ii, "*Astreintes*"; Nicholas, 215ff.

¹⁵⁸ Carbonnier, *Droit Civil*, vi: (11th. ed. 1982), para. 144; Weill and Terré, 1986, para. 834.

¹⁵⁹ See Chabas D. 1972 Chr. 271 and Y. Lobin, "*L'Astreinte en Matière Civile depuis la Loi du 5 Juillet 1972*" In: *Melanges Kayser*, 1979, t.II, p.132.

¹⁶⁰ *Supra*, note 78.

an *astreinte* of 10.000 francs a day was imposed against the defendant who was stubbornly refusing to complete payment and take over a house he had commissioned the plaintiffs to build.

The *astreinte* was also used in *Mme. Kamdem Guemnem v. Tsebo Jean Marie*,¹⁶¹ against the defendant who had accumulated rental charges for a car for over 4 years. He was ordered to pay the arrears, and to return the car, the failure of which was to render him liable to an *astreinte* of 500 francs daily, not the rather extravagant sum of 20.000 francs a day that the plaintiff was demanding.

It can thus be said that the *astreinte* is now well established as a method of indirect specific enforcement of contractual obligations by the courts in Civil Law Cameroon. While the existence and legality of the institution in France were expressly confirmed in 1972 by legislation, its basis in Civil Law Cameroon, in the absence of such legislative support, is to be found in judicial practice.

8.3. REFUSAL TO PERFORM AND TERMINATION.

The defence of refusal to perform or withholding performance and termination are two separate remedies but in this study, I have chosen to treat both as the third and final category of remedies available to an aggrieved party. It will be noticed that the civil law makes a sharp distinction between the two, with the former sometimes being part of the latter while the common law has no clear line of demarcation between the two. Under the common law, the distinction between the two is often blurred and many of the same rules apply to both. This is reflected in common law terminology which often refers to both remedies as rescission.¹⁶² I shall therefore attempt to undertake a separate treatment of the defence of withholding performance and outright termination.

¹⁶¹ *Supra*, note 89.

¹⁶² Treitel, *Remedies*, para. 188.

(1). Withholding Performance.

At **Common Law** the lack of a clear distinction between the defence of refusal to perform and termination should not be taken to imply that the former is entirely unrecognizable. Under the common law performance can lawfully be withheld if the other party has not performed or is not ready and willing to perform. That will arise where performance by the latter is a condition precedent or a concurrent condition for the obligation of the former to perform. Often, the parties will make express provisions in the contract to this effect; but, in the alternative, they may rely on the court to provide an appropriate characterization of the obligations. The second possibility was explored in *Mancho Sammy Anye v. Crédit Foncier du Cameroon*,¹⁶³ in which the plaintiff made an application to the High Court for an interpretation, declaration or pronouncement in respect of a contract of loan and the defendant's alleged breach. The plaintiff was granted a loan by the defendants (a kind of building society) for the construction of a house. The loan was to be disbursed in instalments. The security for the loan was the plaintiff's salary and land certificate. As concerns the salary, the plaintiff gave an irrevocable bank transfer so that any future repayments would be made directly to the defendants. As regards the land certificate, it was to be handed to the defendants as a pre-condition to the contract. However, because of the delay in the processing of the land certificate, the defendants, perhaps mindful of the lethargic rhythm of any administrative process in Cameroon, graciously accepted to start paying out the loan instalments to the plaintiff. It certainly was clear that in doing so the defendants did not waive nor intended to waive that pre-condition. This is because they insisted, and the plaintiff consented, that the Land Department should deposit the said land certificate directly with them as soon as it was ready. The defendants then began to disburse the loan to the plaintiff according to the agreed instalments until they got to the final tranche, when they refused to pay. This was because they had still not received the land certificate.

¹⁶³ HCB/10/91 (Bamenda, 11/12/1991, unreported).

The plaintiff accused the defendants of breach and retaliated by refusing to repay the loan. The defendants in turn exercised their Treasury Rights, which is tantamount to a lien on the plaintiff's salary. Cornered thus, the plaintiff made this application in which he asked the court to interpret the contract and establish who exactly was in breach.

In the plaintiff's view, it was the defendants who were in breach for failing to disburse the last instalment of the loan. He argued strenuously that that must be the correct interpretation since the deposition of the land certificate was not a condition precedent for the complete disbursement of the loan. The court rejected that interpretation and ruled that on the true facts of the case, the deposition of the land certificate with the defendants was a condition precedent of the contract. On this interpretation, the plaintiff was held to be in breach. Consequently, the defendants were perfectly entitled to withhold performance by refusing to pay the last instalment of the loan.

Other special situations exist in common law where the withholding of performance will be lawful. These need not be elaborated upon here but by way of an example, the most glaring one is the unpaid seller's lien.

The **Civil Law** did from a comparatively early time recognise the defence that one party's obligation has not arisen.¹⁶⁴ That defence is generally known in civil law systems as *exceptio non adimpleti contractus* even though in France, the name *exception d'inexécution* is now preferred.¹⁶⁵ This remedy enables a party to refuse to perform his own obligation unless the other party performs his. Notable examples in the Code are articles 1612 and 1613, relating to the seller's right to withhold

¹⁶⁴ See Pillebout, **Recherches Sur L'Exception d'Inexécution**, 1971, p. 3ff; A. Huet, "Exceptio Non Adimpleti Contractus ou Exception D'Inexécution" In: J-Cl. Civ., App. art. 1184

¹⁶⁵ See The Ministry of Justice Circular of 15.9.1977, J.C.P.III.46255, urging courts to avoid the use of Latin expressions.

delivery if buyer does not pay the price.¹⁶⁶ Therefore, when the Douala Court of Appeal ordered the seller of a car to deliver it to the buyer or face an *astreinte*, when the buyer himself had not paid for the car, the Supreme Court was quick to quash that decision on the grounds that under article 1612, the seller was entitled to withhold delivery until such time that the buyer paid or was willing to pay the price.¹⁶⁷

The *exceptio* is now applied to all synallagmatic contracts.¹⁶⁸ This is explained by the doctrine of *cause*, the logic being that if each obligation is the *cause* of the other, non-performance should justifiably be met with non-performance.¹⁶⁹ Because of the lack of reciprocity in contracts other than synallagmatic ones, any attempts to explain the use of the *exceptio* in such contracts by reference to *cause* has been considered to be unacceptable.

There are some main principles that govern the *exceptio*. The first one is that it does not relieve the creditor from the duty to perform. He must himself be able, willing and ready to perform his own obligation if the other party performs. This can work against a seller for instance, who may otherwise want to dispose of the goods. It is not that the creditor cannot make his refusal to perform permanent. The problem is that, subject only to the exception of perishable goods, if he intends to go any further than the *exceptio*, he must bring an *action en résolution* (rescission), for which article 1184 requires judicial intervention. In *Mike Skyllas v. Camer Industriel*¹⁷⁰ the defendants gave the plaintiffs an exclusive agency to sell Yamaha motorbikes. In breach of that agency, the defendants appointed other agents and then discontinued all supplies to the plaintiffs. In an action for damages for breach, the defendants

¹⁶⁶ This is akin to the unpaid seller's lien at common law: s. 39 (1) of Sale of Goods Act 1893.

¹⁶⁷ *SCOA-AUTO v. Ketchateng Jean*, C.S. Arret No. 60 du 23.9.1976, (1976) no.38 B.A.C.S., 5122.

¹⁶⁸ Weill and Terré, para. 863.

¹⁶⁹ Nicholas, p. 207.

¹⁷⁰ *Supra*, note 55.

argued that as the plaintiffs were owing them some money, they were merely exercising their right of *exceptio* under article 1612 of the Civil Code. The plaintiffs denied owing the defendants and pointed out that the defendants, by their conduct, were not just withholding performance but had effectively terminated the contract. In that case, the plaintiffs argued forcefully, the defendants were obliged to seek judicial authorization for an *action en résolution* and not resort to unilateral action. The court agreed with the plaintiffs. A similar decision was arrived at in one French case,¹⁷¹ where a creditor told the debtor to whom he had given an exclusive agency to sell boats, that he was terminating the agency because the latter had failed to sell a single boat out of their agreed yearly target of nine. It was held that while he could suspend the exclusive agency and appoint other sellers, he could not terminate it or give it to another without a total resolution of the contract for which he would need the intervention of the court under article 1184.

The second guiding principle on the application of the *exceptio* is the requirement that there must be a nexus or correlation between the obligation which the creditor is suspending and the obligation of the debtor.¹⁷² In other words, both obligations must be based on a "*fondement commun*", i.e. they must have derive from the same contract. It is thus said that an unpaid motor dealer who happens to obtain possession of the unpaid car because it has been brought into his garage for repairs has no right to retain it on account of the unpaid price because the obligation to pay the price, which arises from the contract of sale, is independent of, and has no link with, the contract of repair.¹⁷³ Although this was not directly the issue before the court, this rule appears to have been observed by the Supreme Court in *La Compagnie Française de l'Afrique Occidentale v. Kanga Appolinaire*¹⁷⁴ in which it ruled

¹⁷¹ Cass com 15.1.1973, D 1973. 473 note Ghestin, Gaz Pal. 1973.2.495.

¹⁷² On the question of link, see Gabet-Sabatier "*Le Role de la Connexité dans l'Evolution du Droits des Obligations*" R.T.D.C. 1980 p. 39 et seq.

¹⁷³ Stark, para. 1637.

¹⁷⁴ Arrêt No 158 du 28 Mars 1961 (1961) no. 3 B.A.C.S.C.O.

against the seizure by the appellants of a lorry truck they had sold to the defendant on credit terms. The said lorry had been taken back to the appellants' garage for routine servicing and they took advantage of that to seize it. They advanced as reasons for the seizure the fact that the driver was not in possession of the requisite documents for the said lorry and therefore did not have the authority of the defendant. This was of course not true. The real reason must have been that the defendant had not completed payment. Whatever the true reasons might have been, the court held that the appellants were not entitled to retain the lorry just because they happened to have it in their garage for servicing. The court did not explain the decision in terms of lack of a correlation between the obligation to complete payment and the obligation to service the car but there is no denying that such an explanation can easily be imputed on that decision.

It is not enough that the reciprocal obligations are correlative. According to the third guiding principle the obligations must also be concurrent or simultaneous. Therefore, once a party is to perform before the other, the defence of *exceptio* is no longer available to him. In the case of the unpaid seller's right to withhold performance, the Civil Code (arts. 1612 and 1613) expressly excludes the case where the seller has agreed that the buyer may pay later. In *CFAO v. Ndamako*,¹⁷⁵ the appellants contracted to sell a car to the respondent. It was expressly agreed that payment was to be by instalments and that it would only follow delivery. The appellant failed to deliver the car and the respondent brought a successful action for breach of contract at first instance. The appellant brought this appeal in which he contended that he could not be expected to deliver the car when the respondent had yet to pay the price. In effect he was invoking the defence of *exceptio*. The Supreme Court rejected that contention and held that the defence of *exceptio* was inapplicable because the contract clearly stipulated that delivery was to precede payment and not

¹⁷⁵ C.S. Arret No. 13 du 15 Dec. 1977 (1978) no.38 B.A.C.S. 5646.

run concurrently.¹⁷⁶

For the creditor to refuse to perform, the debtor's breach need not be total but it has to be serious enough. There are no established rules and the matter lies within the *pouvoir souverain* of the trial judge. Normally, the courts compare the debtor's breach or failure with the creditor's *exceptio* to make sure that the latter is not disproportionate to the former. For example, in *Affaire Mbomiko Ibrahim v. Soitacam*,¹⁷⁷ the respondents undertook to carry out some construction work for the appellant. It was agreed that the work was to be completed within four months. The respondents failed to meet up with the dateline but the appellant did not complain and allowed them carry on with the work. When the work was eventually completed, the appellant attempted to invoke the defence of refusal to perform on account of the respondent's delay. It was held by the Supreme Court, affirming the lower courts, that since the appellant was fully aware of the delay and never complained about it, he must be taken to have acquiesced in it, and for that reason, he was not entitled to withhold performance.

Another aspect about the *exceptio* is that, contrary to the civil law's traditional reluctance to sanction self help, it is available to a creditor without the need for judicial authorization as long as he is himself ready and willing to perform should the debtor do so. But as already pointed out above, if he intends to bring the contract to an end, he will have to apply for a court order. Any creditor who invokes the *exceptio* without a court order does so at his peril, in the event that a court later rules that he abused the use of that defence or that it was not the appropriate action to take.¹⁷⁸

Finally, the apparent similarity between the remedy of *exceptio* and the *droit de*

¹⁷⁶ For a similar, and earlier, decision in France, see Stark, para. 1645: *en cas de terme pour le solde du prix, l'exception ne peut être invoquée que pour l'acompte immédiatement dû*: Orleans 23 Oct. 1975, J.C.P 77, II, 18653, note Le Tourneau.

¹⁷⁷ C.S. Arret No. 99/CC du 23 Avril 1981 (1981) Nos.21 & 22 Rev. Cam. Dr., 230.

¹⁷⁸ See the *Mike Skyllas case*, supra, note 55, and the French case: Civ 1^{er}, 5 Mars 1974, JCP 74, II, 17707, note J. Voulet.

*rétenion*¹⁷⁹ (lien) needs some brief mention here. Both are confusing and have caused doctrinal controversy.¹⁸⁰ In the apposite words of one commentator, "*Le droit de rétenion ...est trop suivant confondu par les tribunaux et les praticiens avec l'exceptio non adimpleti contractus.*"¹⁸¹ All that needs to be said here is that both serve the same purpose of putting pressure on the debtor to perform. Both can also lead to the same result at times. For example, the unpaid seller's retention of the thing sold or the deposittee's retention of the thing deposited. Yet these similarities may be misleading as they mask some profound differences. First, the *exceptio* is much wider in that, the creditor is not confined in retaining a specific thing to which the debtor is entitled. But as concerns the *droit de rétenion*, it is a rule that it cannot be exercised on anything other than the specific thing deposited with the deposittee in relation to the contract.¹⁸² Secondly, unlike the *exceptio*, the *droit de rétenion* is not confined to synallagmatic contracts, neither is it confined to contracts at all.¹⁸³

(2). Termination.

In this section, I am concerned with the remedy available to an innocent party by way of rescission or termination. The aim of the aggrieved party is no longer to withhold or suspend performance until the other party performs; it is to bring the contract to an end or to treat it as discharged by breach. Under the common law,

¹⁷⁹ For *droit de rétenion*, see generally N. Catala, "*De La Nature Juridique du Droit de Rétenion*" R.T.D.C. 1967, especially pp. 9 et s., and Shapel, "*Le Droit de Rétenion en Droit Positif*" R.T.D.C. 1981, 539.

¹⁸⁰ See Mazeaud and Chabas, para. 1131, and Mazeaud on the *droit de retention*, t. 111, para. 110 et s.

¹⁸¹ Rodiere, note sur Cass. 22 Mai 1962, D. 65. J. 59.

¹⁸² Stark, para. 1635; Mandé-Djapou, "*La Notion Etroite du Droit de Rétenion*" JCP 76, 1, 2760.

¹⁸³ See Nicholas, p. 210.

doubt have been cast by some commentators whether on the face of it, this is a remedy at all.¹⁸⁴ It is presented as something stemming from the nature of a contract itself; a party only undertakes certain things under the contract, and it follows that if the circumstances in which his promise to perform or continue performing does not arise, he simply has no obligation, or no further obligation, to perform. Thus common law textbooks vary considerably as to whether particular topics relevant to termination are allotted to the chapter on "performance" or to that of "breach".¹⁸⁵ To put it another way, the right to treat the contract as discharged may be regarded as one provided by the parties themselves; as such it need not be thought of as a remedy at all, nor controlled by the law. This impression is strengthened by the fact that the right to refuse performance can in appropriate cases be exercised where there is no breach at all; and that where there is a breach, a person exercising the right can also sue for damages. This, it may be argued, is the remedy; the right to regard oneself as discharged. But it could also be said that it was the fact of regarding that right as a remedy which led in part to the erroneous view once held that a person who treated the contract as discharged could not also sue for damages.¹⁸⁶

It seems that this problem does not arise under the civil law, where what the common lawyer calls discharge by breach is more obviously treated as a remedy and controlled as such. In French law, the right seems to have been secured for contract law by importing an implied resolutive condition into all contracts: there is an implied resolutive condition to terminate the contract if the other party completely fails to perform (*ne satisfera point à son engagement*). At this juncture, it is proposed to carry out the respective common law and civil law treatment of the right to rescind

¹⁸⁴ This is the view of Waddams, *"Remedies as a Legal Subject"* (1983) 3 O.J.L.S. 113.

¹⁸⁵ Treitel, (chapter 18) treats rescission for failure to perform under "Performance" and treats (chapter 19) "repudiation before performance is due" under breach, while Cheshire, Fifoot and Furmston, (chapter 18) treat it under "Performance and Breach".

¹⁸⁶ See *Johnson v. Agnew* [1980] A.C. 367.

the contract.

(a). Rescission at Common Law.

The law governing the right to rescind for failure in performance under the common law is complex and difficult. The difficulty starts right at the level of terminology. The use of traditional terminology such as "rescission" or "termination" has been criticised. In the *Photo Productions* case, Lord Diplock described the use of the word "rescission" as "misleading", unless it was borne in mind that, in cases of breach, such rescission did not deprive the injured party of his right to claim damages for the breach.¹⁸⁷

On an even more serious note, it can and it has indeed often been pointed out that although rescission may often give rise to appropriate results - allowing efficient detachment from unperformed contracts which are likely to prove unsatisfactory, saving cost by self-help, and the avoidance of the compulsory extension by the innocent party to the guilty party - it may equally give rise to inappropriate results, in enabling the innocent party to escape from a bad bargain, give him priority in bankruptcy situations and sometimes allowing him to take advantage of windfalls such as improvements to his property which were not what was asked for.¹⁸⁸ In terms of social utility, then, the adoption of this remedy in some circumstances may be questioned: notably where the creditor can deal with the consequences of the breach more cheaply than the debtor, for example because he has better access to the market for the disposal of the defective goods.¹⁸⁹

From the foregoing, it is evident that the courts are faced with the difficult task of balancing two diametrically opposed interests: that of the party seeking rescission

¹⁸⁷ [1980] A.C. 827, 851.

¹⁸⁸ See generally Honnold, "Buyer's Right of Rejection" (1949) U.Pa.L.R. 457; Priest, "Breach and Remedy for the Tender of Non-Conforming Goods Under the Uniform Commercial Code: An Economic Approach" (1978) 91 Harv. L.R. 960.

¹⁸⁹ Priest, *Op. cit.*, note 188.

and that of the party resisting it. This in turn means that the exercise of the right has such significant remedial consequences that it needs to be controlled. To do so, the courts have developed certain rules and distinctions which help determine or limit the availability of rescission. I shall now consider the important ones with a view to finding out what the courts in Common Law Cameroon have made of them so far.

(i). Indirect Control On the Right to Rescission.

It was long ago demonstrated that by the importation and manipulation of what may be called constructive conditions in contracts the courts have in fact been able to give effect to significant policy judgements regarding the appropriate reciprocal obligations of the parties to a contract.¹⁹⁰ By importing an order of performance or a requirement of readiness to perform they have avoided situations where one party inappropriately gives credit to another, or have given one party security for performance or a means of coercing performance; they have however avoided doing so where the result would be forfeiture or unjust enrichment. But this control, it is obvious, is of a subtle and indirect nature.

In general, the position in England is that only substantial or serious breaches justify termination. At least three techniques (depending on how one arranges them for exposition purposes) are available to determine when the breach is serious enough to entitle the innocent party to treat the contract as discharged. The account which follows relates to how these techniques have been followed or developed in Cameroon. It is fair to say that the courts in Cameroon have not always shown a conscious application of these techniques, yet it is possible to read or impute them into some of their decisions.

¹⁹⁰ Patterson, " *Constructive Conditions in Contracts*" (1942) 42 Col. L.R. 903. Section 28 of the *Sale of Goods* 1979 (U.K.) (payment and delivery concurrent conditions) is an example of this technique.

*The Condition/Warranty Technique:*¹⁹¹ Some obligations in certain types of contract may be regarded as so important that any breach of them, with whatever consequences, entitles the other party to terminate the contract. Such obligations or terms are traditionally called "conditions". They are distinguished from "warranties", breaches of which, however serious, can only give rise to damages claims. In *Alfred Mbah v. Roland Boman & Joseph Ncho*,¹⁹² the plaintiff happened to have the necessary equipment for a petrol garage on his premises. But these equipment were idle because the tenant who installed them and who operated the petrol garage had quit. The plaintiff, with the backing of the second defendant, tried to obtain the franchise from British Petroleum and failed. However, B.P. intimated to the second defendant that they would be prepared to grant him the franchise directly, after which he would be free to appoint whoever he so wished to run the petrol station. The second defendant accepted B.P.'s offer of a franchise and then proceeded to conclude a contract with the plaintiff, whereby the latter was appointed a sub-agent, with the responsibility of running the petrol garage. It was a main term of the contract of agency that the plaintiff was to procure all the required fuel from the second defendant alone. In other words, the second defendant would obtain fuel from B.P. and supply to the plaintiff for retail. Business moved on well for a while until the plaintiff alleged that the first defendant, a driver of the second defendant, had supplied him with adulterated fuel. The defendants denied this allegation. An unsuccessful criminal charge followed against the first defendant. At that point the relationship between the parties became strained. Thereafter, the second defendant discovered that the plaintiff had been buying fuel from B.P. through a third party and sometimes directly, apparently using the second defendant's name. On making this discovery, the second defendant wrote to B.P. to stop supplying the plaintiff with fuel. The plaintiff reacted by bringing this action for breach of contract and

¹⁹¹ Reynolds, "Warranty, Condition and Fundamental Term" 79 L.Q.R. 534; Shea, "Discharge from Performance of Contracts by Failure of Condition" 42 M.L.R. 623.

¹⁹² HCB/73/85 (Bamenda, 26-05-1987, unreported).

destruction of business goodwill. The second defendant counter-claimed, arguing that by procuring fuel either through a third party or directly himself, it was the plaintiff who was guilty of breach. The Bamenda High Court found in favour of the defendant. In arriving at that conclusion, it is obvious that the court, though not directly stating as such, was clearly treating that term of the contract which required the plaintiff to get all his fuel through the second defendant alone as a condition. Since that condition had been breached, the court ruled that the second defendant was entitled to sue for damages¹⁹³ or rescind the contract.

Perhaps the most direct application of the condition/warranty technique in Cameroon is that by the Bamenda Court of Appeal in *Scholastica Nsaiboti v. Felix Ezeafor*.¹⁹⁴ In that case, it will be recalled that the appellant who had bought a car from the respondent, purported to rescind the contract of sale four days after taking possession. In support of the appellant's attempt at rescission, counsel contended on her behalf, *inter alia*, that by section 12 (1) of the Sale of Goods Act 1893, the respondent had no right to sell the car because it was registered in someone else's name (Okafor), so that property could not pass to her. This was only an ostensible reason, the real reason being the appellant's impecuniosity, as betrayed by the letter she wrote to the respondent, in which she pleaded with the respondent to look for another buyer because she would be unable to pay the balance not just within the agreed six weeks but even within a year. On these facts, the Court of Appeal, like the High Court before it, said that there was no evidence (the car had not been seized, neither had anyone challenged or disturbed the appellant's quiet possession) in support of the appellant's contention that there was a breach of the implied condition and warranty provided by section 12 of the Sale of Goods Act 1893. Since there had been no breach of any condition it was held that the appellant was not entitled to rescind the contract.

¹⁹³ The court cited in this regard the case of *Forslind v. Becheley Crendal* [1922] SC. H.L. 173.

¹⁹⁴ *Supra*, note 134.

The Hong Kong Fir Technique: I choose to refer to the second technique by the name of the case¹⁹⁵ that brought it back to prominence in England, even though it actually derives from older antecedents. By this technique, the innocent party may terminate only if he has been substantially deprived of the whole benefit which it was intended that he should receive from the contract. For a time it appeared as though this second approach had supplanted the first. Lord Wilberforce did call it the "more modern doctrine",¹⁹⁶ while in the *Hong Kong Fir* case itself Lord Diplock opened up new vistas, suggesting that the condition/warranty technique was outdated and ought to be scrapped.¹⁹⁷ But the co-existence of the two techniques, and the continuing validity of the condition/warranty technique, was finally established in *Bunge Corp. v. Tradax Export S.A.*¹⁹⁸ And that co-existence can also be seen in the case of *Jonas Puwo v. Ndi Cho Samson*.¹⁹⁹ The parties entered into a contract in which the defendant was to provide the plaintiff with a gear box for a Mercedes truck for the sum of 1.800.000 francs, of which 1.000.000 francs was paid in advance. The defendant delivered the gear box and insisted on (and got) payment of the balance; but when it was tried, it did not fit into the said truck. It was discovered that the description of the gear box provided by the defendant did not match that which the plaintiff had asked for. The plaintiff brought an action for rescission of the contract and restitution of the price. The court concluded that there had been breaches of certain implied conditions of the Sale of Goods Act 1893, namely: that the goods shall correspond with the description (section 13); that the goods shall be reasonably fit for the particular purpose for which they were required (section 14 (1)); and that the goods shall be of merchantable quality. From that and for other reasons

¹⁹⁵ *Hong Kong Fir Shipping v. Kawasaki Kisen Kashai* [1962] 2 Q.B. 26.

¹⁹⁶ *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 998.

¹⁹⁷ [1962] 2 Q.B. 26, 69.

¹⁹⁸ [1981] 1 W.L.R. 711.

¹⁹⁹ HCB/31/83 (Bamenda, 12-9-1984, unreported).

that are not relevant here, the court went on to hold that the plaintiff was entitled to rescission and a refund of the contract price plus damages for breach of contract. It can thus be said that the first and second technique are in play here, since in addition to, or as a result of the defendant's breach of those implied conditions, the plaintiff was substantially deprived of the whole benefit which he should have received from the contract.

The Conduct of the Party Technique: This approach asks more generally whether the conduct of the party in breach is such as to indicate an intention to repudiate his contractual obligation. It is relevant particularly to anticipatory breach, to long term contracts and to situations in other contracts where the innocent party may be regarded as justified in not carrying on because of loss of confidence in the other party (for example, because the goods delivered are so bad that he does not want them replaced). The case of *Fon Fongyeh Njifornuh II v. Guinness Cameroon S.A.*,²⁰⁰ provides a perfect illustration of this technique. In December 1974, the parties entered into an informal arrangement whereby the respondent company was to hire the appellant's premises as their depot in Bamenda. The agreed rent was 15.000 francs monthly. The respondents took occupation and after 4 months, they approached the appellant with a proposal to have the agreement formalized. They also proposed that in view of the fact that a more permanent agreement was about to be entered into, consideration should be given to a reduction of the rents from 15.000 francs to 12.000 francs, which the appellant unreservedly accepted. This new contract which was to become effective as from 1st April 1975 was reduced into writing and duly registered with the relevant government department.²⁰¹ But soon after the contract was registered, the appellant approached the respondents' Bamenda branch manager to inform him that the Ministry of Justice was negotiating with him to hire the very premises he had just let to them, and that he was seriously considering it. In reaction to that development, the respondents' manager asked for

²⁰⁰ BCA/4/78 (Bamenda, 28-5-1978, unreported).

²⁰¹ For the requirement of registration, see chapter 7.

the appellant's own copy of the tenancy agreement which he took together with theirs to the Stamp Duty department for cancellation, thereby terminating the tenancy agreement. It so happened that the expected occupation by the Ministry of Justice did not materialise. Sensing that he would lose out on both fronts, the appellant turned round and sued the respondents, alleging that they were in breach of their tenancy agreement with him. Not surprisingly, he lost at first instance in the Bamenda High Court. Not content, he appealed and lost again. In the Bamenda Court of Appeal, Wakai CJ. said that, "By his utterances and conduct, the appellant had positively determined the contract". He had put the future of the tenancy agreement with the respondents in grave doubt because he had struck a deal with the Ministry of Justice, which unfortunately for him did not work. In the light of that analysis, it was held that the appellant was in breach and that the termination of the tenancy agreement by the respondent was simply the natural outcome of that breach. The court was even mildly surprised that the respondents had themselves not brought an action for breach against the appellant in the first place.

It is safe to say that the right to rescind the contract under the second and third techniques will in most cases be exercised fairly. Since the innocent party has failed to receive in full what he bargained for, or has justifiably lost confidence in the other party, he cannot be blamed for refusing to proceed. The first technique, however, potentially allows a contracting party to escape from the contract on a technicality - depending, of course, on how ready the courts are to detect conditions. As one is dealing with the common law, it may not be possible to say that the innocent party's right to rescission must be exercised in good faith because the common law has traditionally eschewed considerations of this sort. But if the plaintiff can insist on his legal rights without any compromise, one wonders when (if at all) such a technique yields fair results.

It seems to do so in the case where the innocent party is a consumer. For consumers damages may be an inadequate remedy; besides, they may not wish to go to court, and if they do, may have difficulties establishing loss measurable in a monetary way. Their best remedy may well be to refuse to accept unsatisfactory

goods, or to return them. That was the option taken in the *Jonas Puwo* case,²⁰² where it will be recalled, the plaintiff insisted, and succeeded in returning a wrong gear box which the defendant has supplied to him. In such circumstances, it is only fair to expect the guilty party, especially where he is himself a dealer in such goods to retain the goods, not least because he is in a better position to dispose of it. Obviously, where the plaintiff is a dealer and can more than adequately treat or dispose of the defective goods, perhaps, even more so than the defendant, there is a strong case for questioning his insistence on his contractual right to rescission. Damages in such cases may be much more appropriate.

Beyond this, there is a set of restrictions, still not fully worked out, placed on the exercise of the right to treat the contract as discharged (by breach) by an apparatus of rules relating to waiver, estoppel, election and so forth. These seem to be a characteristic of common law systems, and they are significant in that they partly compensate for the lack of more formal controls of the exercise of the right which exists under the civil law, for instance. A good example is the highly uncertain area of law relating to persons who abandon or fail to exercise their rights, as by accepting goods which do not conform with the contract. It is astonishing that in such an important area the law in England remains uncertain.²⁰³ That notwithstanding, Cameroonian courts have been known to use the doctrines of waiver and estoppel. In *Forbah Joseph v. Cameroon Bank*,²⁰⁴ the defendant bank failed to recover money owed to them (for which the plaintiff stood surety) when it was due, despite the availability of funds in the principal debtor's account, and proceeded instead to grant a further overdraft facility (to which the plaintiff was not privy) to the principal debtor. Later on the bank attempted to recover the money from the plaintiff. It was

²⁰² *Supra*, note 118.

²⁰³ The latest leading authority suggests merely that everything turns on whether it is "inequitable" to go back on the concession: *Société Italo-Belge pour le Commerce et l'Industrie S.A. v. Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1982] 1 All E.R. 19.

²⁰⁴ HCB/75/87 (Bamenda, 2-2-1989, unreported).

held by the Bamenda High Court that the defendants, by failing to recover their money from the principal debtor's account had waived their right against the plaintiff, and that the granting of further credit facilities to the principal debtor amounted to an estoppel. This is certainly not a typical rescission case. Nevertheless, it is pertinent here in so far as it demonstrates the use of waivers and estoppel.

(ii). The Need For Direct Control On the Right To Rescission ?

All that which has been considered thus far relates to indirect forms of control. But should there be specific and direct forms of control on the exercise of the contractual right of rescission? Will that be justified and practicable? Such direct forms of control exist in civil law systems and in the case of Civil Law Cameroon it will be shown below that the control is exercised sometimes by submitting the matter to the decision of a court and sometimes by requiring the service of notice, or a combination of the two.

The need for more control seems to be gaining in appeal in common law jurisdictions. In New Zealand, *The Contractual Remedies Act 1979* recognises in some measure the remedial nature of discharge by breach, and substitutes for the common law principles the remedy of cancellation²⁰⁵ which is subject to the control of the court.²⁰⁶ There is however a provision (section 5) exempting from this control express provisions made by the parties.

In England, the Sale and Supply of Goods Act 1994 has tightened up the consumer's remedy of rejection in the sale of goods by defining the notion of merchantability more stringently.²⁰⁷ The introduction of the notion of satisfactory

²⁰⁵ Section 7. For a more detailed comment on that section, see Dawson and McLauchlan, *The Contractual Remedies Act 1979*, 1981, chapter 6.

²⁰⁶ Section 9.

²⁰⁷ See section 3 on the right of rejection. This section does not substitute but adds to section 35 of the Sale of Goods Act 1979.

quality in place of merchantable quality,²⁰⁸ should help counteract those decisions where courts appear to have held goods merchantable not because they considered them satisfactory, but because they thought rejection too drastic a remedy: the result was that there was no remedy at all. But in non-consumer situations, the 1994 Act limits the exercise of the right to reject in cases where the breach is so slight that rejection would be unreasonable.²⁰⁹

These are isolated instances which suggest that there may be room for a general rubric permitting the court to intervene in some cases. If it is thought that there should be the possibility of such intervention on a general basis, then that will undoubtedly require some application or extension of the equitable jurisdiction to relieve against the unconscionable exercise of legal rights. There is English precedent for this in the decision of Lloyd J. in the *The Alaskan Trader*,²¹⁰ where he held that the right to refuse to accept a breach and sue for a liquidated sum was limited in the last resort:

"There comes a point at which the court will cease, on general equitable principles, to allow the innocent party to enforce his contract according to its strict legal terms."

There are Cameroonian precedents too but before they are considered, mention must be made of an immediate obstacle here: the House of Lords decided in *The Scaptrade*²¹¹ that the equitable rules as to relief against forfeiture were inappropriate to the commercial relationship embodied in a time charter, and this was followed in the context of a licensing agreement in *Sport International Bussum N.V. v. Inter-*

²⁰⁸ See above, note 207.

²⁰⁹ See section on modification of remedies in non-consumer cases. This section too only adds to section 15 of the 1979 Act.

²¹⁰ *Clea Shipping Corp. v. Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All E.R. 129.

²¹¹ *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694.

*Footwear Ltd.*²¹² There is no need to elaborate on these decisions here but it should be noted that they have been the subject of some attack.²¹³ But even setting aside any criticisms, the decision of the House of Lords to exclude the interference of equitable jurisdiction from the operation of express contractual terms in time and voyage charter operations does not mean that equitable intervention is inadmissible altogether, even in England,²¹⁴ even less so in Cameroon.

Three judgements given in the then West Cameroon Court of Appeal are of first rate importance in that they brought into focus the debate as to whether the courts should grant equitable relief against forfeiture. In the first case, *Menyoli Motors Co. Ltd v. Frederick Ezedigboh*,²¹⁵ the court, applying the English decision in *Stocklosser v. Johnson*,²¹⁶ upheld a general power to grant equitable relief against the forfeiture of the buyer's deposit in a hire purchase contract after the rescission of the contract, where the sum forfeited was out of all proportion to the loss suffered by the seller and when it would have been unconscionable for the seller to retain the money. The next case, still involving a hire purchase contract, was *Joe Allen Bartholomew (London Group) Ltd. v. Sebastien Mbinka*.²¹⁷ Like in the earlier case, the seller (the appellants) seized and sold the truck, the subject of the hire purchase, after the respondent had paid a substantial amount towards the total price. It was held that "the actions of the appellant company were harsh and unconscionable in the circumstances" and that "that was sufficient to bring the case within the

²¹² [1984] 1 W.L.R. 776.

²¹³ Gummow, "Forfeiture and Certainty: The High Court and The House of Lords" In: Finn, ed., *Essays in Equity*, 1985, ch. 2, pp. 43-44.

²¹⁴ In *Giles & Co. Ltd. v. Morris* [1972] 1 AER 960 at 969 Megarry V.-C said that the "rule" against specific enforcement is "plainly not absolute and without exception".

²¹⁵ W.C.C.A/7/68 (Buea, unreported).

²¹⁶ [1954] 1 Q.B. 476.

²¹⁷ WCCA/4/68 (Buea, unreported).

principles laid down by the Court of Appeal in England in *Stocklosser v. Johnson* as approved by the this same court in *Menyoli Motors v. Ezedigboh*". Accordingly, equitable relief against forfeiture was granted.

But in the third case, *Ets. Tsewole v. John Holt Motors*,²¹⁸ the court refused to grant equitable relief on facts that one would be hard pressed to distinguish from those of the two earlier cases considered above. Not surprisingly, the issue provoked a serious disagreement between the Chief Justice (who dissented) and the other two judges, who produced the majority decision. In that case, the appellant hired three lorries from the respondents. When the appellant defaulted in the payment of hire instalments, the respondent moved in swiftly to seize all three lorries. It was found as a fact that the balance due to the respondents was about 2.750.000 francs and that they actually re-sold the lorries for 4.650.000 francs. On the evidence of these figures, counsel for the appellant raised the important question of equity and urged the court to apply equitable principles so as to enable the appellant to recover the balance of the proceeds of the resale, that is after the respondents must have set-off the sum that remained outstanding on the hire purchase contract. The trial judge rejected the plea, maintaining that the respondents were well within their legal rights of rescission, seizure and sale.

That decision was confirmed on appeal, with the Court of Appeal adding bluntly that "equity mends no man's bargain except in the most exceptional circumstances". In the court's view this case was not exceptional enough to warrant the grant of equitable relief. In arriving at this decision, the court relied heavily on the English case of *Helby v. Mathews*²¹⁹ but with no disrespect to that court, it is submitted that that reliance was misguided. Taking a close look at the facts of that case, it is difficult to see how *Helby v. Mathews* can be considered as good authority for the decision in the *Tsewole* case, because the only similarity between them is that they are concerned with hire purchase contracts. In the *Helby* case, the appellant hired

²¹⁸ WCCA/21/70 (Buea, 1970, unreported).

²¹⁹ (1895) All E.R. (H.L) 21.

out piano to a certain B, under terms which B could own it after the payment of a certain amount through monthly instalments. Until such time, the piano was to remain the property of the appellants. It was also a term of the contract that on no account should B let the piano out of his possession. B was later to pledge the piano with the respondents without notice of the appellant's claim. In an action by the appellant to recover the piano from the respondents the House of Lords held, *inter alia*, that B had not bought or agreed to buy the piano within section 9 of the **Factors Act 1899** and so he was unable to give the respondents a good title under that section. The appellant was therefore entitled to succeed.

It is thus clear that the facts of the *Tsewole* case do not fit squarely into the *Helby* situation. However, if one questions the decision not to grant equitable relief in the *Tsewole* case, it is not so much because it is wrong in strict law, after all the hirer was in arrears. It is rather that having granted equitable relief in similar cases, one would have expected the court to do same in this case as well. This point is well borne out by the dissenting judgement of Cotran C.J., who, while accepting that the appellant was in arrears, took the view that there was a strong case for the intervention of equity in this case. He felt that because the owners had sold the three lorries for considerably more than what they were being owed as the balance, the hirer was entitled in equity and fairness to receive what was over and above that balance.

The foregoing analysis demonstrates that Cameroonian courts have been prepared in some cases to apply equity to deny the exercise of the strict right of rescission and its consequences. It will have been noticed that all three cases considered relate only to relief against forfeiture. I will not enter into dispute on the question whether any such equitable jurisdiction should only be associated with that to relief against forfeiture, or more generally with that regarding the unconscionable exercise of rights; or as to whether the jurisdiction to relieve against forfeiture should be confined only to certain rights, for example, property rights and if not how much further it should go. To do that one needs to be steeped in equity to a degree to which I have no pretence. Nevertheless, I take the position that, even where a problem is viewed

purely from the contract side, there may well be situations where the traditional role of equity can in some form legitimately be invoked to modify strict contract rights to a limited extent. That Cameroonian courts have done so is to be welcome even though there does not appear to be many recent cases revealing the intervention of equity, perhaps because the need has not arisen.

(b) Rescission under the Civil Law.

Where the creditor does not wish to limit his action to the *exceptio*, he has a further option in rescission of the contract (*action en resolution*), with damages if possible. The legislative basis for rescission is article 1184 (2), "the party for whose benefit the contract has not been performed has the choice either to compel the other to perform or to claim rescission with damages". This remedy is similar to rescission for breach under the common law, though the two should not be confused.

The basic idea seems to be that it is better to put an end to a contract the performance of which has been jeopardized by a party's breach. That is perhaps why article 1184 (1) confines rescission to synallagmatic contracts.²²⁰ Nevertheless, because of its complex history,²²¹ the basis of rescission is disputed. It has been regarded, following article 1184, as resting on an implied *condition résolutoire* (terminating condition),²²² although the operation of such a condition is hard to reconcile with the judicial character of rescission. It has also been seen as a sanction for bad faith or a means of compensating loss. But the most generally accepted basis lies in the interdependence of the reciprocal obligation of the synallagmatic contract,

²²⁰ There are a few minor exceptions, e.g. in cases of life annuities (art. 1978 of the Civil Code).

²²¹ Weill and Terré, *Op. cit.*, note 15, para. 481; Mazeaud/Mazeaud, *Op. cit.*, note 13, para. 1088.

²²² It seems that this is historically not to be derived from the Roman *lex commiseria* (resolutive condition).

even though this does not explain why the intervention of the judge is required.²²³

Notwithstanding the controversy surrounding its basis, judicial rescission has developed clear-cut features, as regards both conditions of its operation and its consequences.

First, there must have been a breach attributable to the debtor, that is, not resulting from a fortuitous event. In *La Compagnie Française de L'Afrique Occidentale v. Kanga Appolinaire*,²²⁴ the appellant sold a Ford truck to the respondent on credit. The respondent duly kept up with the repayment but when the truck was taken into the appellant's garage for routine servicing, they seized and refused to release it, under the false pretext that the driver was not an agent of the respondent and that he was not armed with the requisite documents to ply a heavy goods vehicle. The respondent reacted to this by rescinding the contract and claiming restitution of all sums he had already paid as part of the price. The Supreme Court, affirming the decision of the lower court, held that since the seizure was unlawful, the appellants were guilty of breach for which the respondent was entitled to rescind the contract and recover all sums paid to the appellants.

In another case, *Affaire Ondoua*,²²⁵ rescission was denied because the court decided that no breach was imputable to the debtor. The case concerned a contract of sale for which payment was to be by instalments. It was expressly stated that if the buyer failed to pay any instalment on the agreed date, the seller would be free to rescind the contract, without any indemnity. The instalment for 30 September 1969 was late, the buyer attempting to make up for it by issuing two money orders dated 29 October 1969 and 13 November 1969. The seller declined to accept them and purported to rescind the contract. The trial judge ruled that he could not. This ruling was based on a technicality, namely that, the seller had not given the buyer notice of

²²³ Carbonier, *Op. cit.*, note 15, para. 81, "Théorique Juridique".

²²⁴ Arrêt No. 158 du 28 Mars 1961, (1961) No.3, B.A.C.S. Cam. Or.

²²⁵ Arrêt No. 31/CC Mars 1972, (1973) No.3 Rev. Cam. Dr., 87.

default (*mise en demeure*), therefore, the payment though late, was still valid. The Court of Appeal upheld the trial court but explained further that the late payment was considered valid because a debtor is allowed to avoid or defeat rescission by offering performance or payment after the agreed date but before any *mise en demeure*.²²⁶ Since the buyer had offered payment, albeit belatedly, which the creditor refused to accept, and since the creditor had not put the buyer in notice, the Court of Appeal reasoned that no fault was imputable to the buyer and then concluded: "*Qu'en l'absence de faute de sa part dans l'exécution de son engagement, il ne peut y avoir lieu à résolution de la vente*". The Supreme Court too was in total agreement with the Court of Appeal's reasoning and judgement.

It would appear as though the rule that the fault must have been imputable to the debtor to warrant rescission is not absolute. The courts in France have been known to apply the remedy also where the non-performance is not attributable to the defendant because it results from *force majeure*.²²⁷ So far there is no evidence of that in Cameroon.

Secondly, the breach must be sufficiently serious, although no legislative text expressly so provides. The court may not grant rescission if the non-performance is only partial or temporary, and whether it is either of them, is a question of fact. So too is the degree of seriousness. The judge has a discretionary power to decide whether or not to bring the contract to an end and he is not constrained by the choice of the plaintiff.²²⁸ Because of the *pouvoir souverain* of the trial judge, coupled with the fact that judgements are generally not elaborate, it is difficult to state with any certainty what factors Cameroonian courts consider in their assessment of the question of seriousness. However, it is possible to explain the decision in *Affaire Ondoua* just considered above, in terms of seriousness of breach, or rather the lack of it. It will

²²⁶ This is also true of France, see Nicholas, p. 238.

²²⁷ See Nicholas, pp 200-1, especially the *Gare St Lazare* case (Paris 13.11.1943, Gaz Pal 1943.2.260).

²²⁸ Mazeaud and Chabas, *Op.cit.*, note 13, para. 1114.

be recalled that the seller refused to accept payment because it was late by slightly over a month. Under such circumstances, it could be said that the breach was either not sufficiently serious or that it was only partial and temporary. Such an interpretation, it is conceded, would still not have affected the results reached by the court - the denial of rescission. It is, therefore, not suggested that the reasoning of the court was wrong. Neither was the result. But it is submitted that the reasoning presently being canvassed, i.e. a rationalization in terms of the breach not being serious enough or that it was only temporary, does appear to be neater, if not simpler than that adopted by the trial court (that the buyer had not been put in notice), or that adopted by the Court of Appeal (that an offer of belated performance can defeat rescission).

The third feature on rescission is that as a general rule, the party claiming it need not prove loss. There is little case-law on this point in France,²²⁹ or in Cameroon, where one may point to the fact that in *C.F.A.O v. Ndamako*,²³⁰ rescission was granted even though there was no evidence of any loss or a claim by the party demanding rescission that he had actually suffered loss.

The final feature on rescission is its judicial character. For there to be rescission, there must be a judicial decision. This is what distinguishes the French system most clearly from the English one. The exercise of the right of rescission, according to article 1184 of the Code, is not at the free choice of the injured party: it is subject to the power of the court (*doit être demandée en justice*). This is simply a reflection of French law's dislike or rejection of self-help, expressed in the maxim *nul ne peut se faire justice à soi-même*.²³¹ The courts in Civil Law Cameroon, perhaps jealous of this power of control accorded to them by the law, have always stressed the need

²²⁹ See however, Cass. civ., 27 Apr. 1948, JCP 1948. II. 4594, note E. Becque, and commentary by Carbonnier, R.T.D.C. 1949, 95; the case is to be understood by reference to leases and the particular circumstances involved.

²³⁰ Supra, note 175.

²³¹ See generally Beguin, "*Rapport sur l'adage 'Nul ne peut se faire justice à soi-même' en Droit Français*", In: *Travaux Capitants*, (1966) 18, p. 41.

for judicial intervention whenever there has been an attempt at rescission.²³² In *Affaire François-Simon v. Agence Havas Afrique*,²³³ the appellant was acting as agents of the respondents, with a 15% commission on all deals. Sometime later, the respondents proposed to reduce the appellant's operations and drop her rate of commission from 15% to 12% because, they claimed, that was the rate at which they could operate if they were not to make any losses. The appellant's response was to rescind the contract. It was held by the Supreme Court, affirming the Court of Appeal, that she was wrong to rescind the contract (1) because the respondents were not in breach - they had simply tried to renegotiate the contract by a proposing a drop in the amount of commission, which she was entitled to accept or refuse and (2) that failing an amicable renegotiation of the contract, she had to,

"soit d'user des voies des droit pour obtenir l'exécution si celle-ci demeurait possible, soit de demander, à titre de sanction, la résolution judiciaire du contrat avec octroi de dommages-intérêts".

The court was saying in effect that, even if the respondents were guilty of breach, the appellant would still not have been entitled to automatic rescission. She would have had to seek a court order to rescind the contract.

Such judicial character is so inherent in the remedy that, although it can be waived by the parties, an automatic terminating condition is regarded with suspicion by the courts. Even in the face of such conditions, the courts will still expect to exercise some degree of judicial control. However, the judge before whom the point is taken cannot exercise his *pouvoir souverain*; he can only verify the breach and, in consequence, the automatic annulment of the contract. Because of the civil law's traditional loathing of self-help, the judge will, most assuredly, tend to interpret these clauses restrictively as well as requiring that the debtor be given a prior formal notice

²³² See for example, *Affaire Mike Skyllas*, supra, note 55 and *Affaire Ondoua*, supra, note 125.

²³³ Arrêt No. 13 du 18 Nov. 1976, (1977) No.36 B.A.C.S., 5285.

that he is in breach. This approach is most glaringly illustrated in *Affaire Ondoua*,²³⁴ where, it will be remembered, there was a stipulation that the failure to pay any instalment on the agreed date will leave the creditor free to rescind the contract. It was held that such a stipulation did not *per se* exempt the creditor from giving the debtor notice of default, neither did it dispense with the need for judicial control of the creditor's right to rescission. The court was no doubt mindful of the fact that it could not eliminate the automatic rescission clause altogether so it proceeded to interpret it as narrowly as possible so as to bring it under its control.

Situations exist, however, where a judicial decision is not necessary. Article 1657 of the Code, for example, authorizes the "automatic rescission of a sale, without recourse by the seller and without a formal summons to the buyer, where the period for collection agreed by the contract has expired". This option of unilateral rescission is limited to the sale of moveables, where the collection must be made by a prescribed date and such a date was one of the essential and determinative conditions of the sale. Indeed, the seller must be able to rapidly dispose of the goods with which he is saddled and which are in danger of deteriorating.²³⁵ French case-law recognizes the possibility of unilateral rescission for any contract in case of emergency, where continuation of the contract may cause irreparable harm. Such rescission takes place at the creditor's own risk and the courts exercise *ex poste* a very strict control on the option, which remains exceptional.²³⁶ It is also likely that the Cameroonian courts will excuse unilateral rescission in the case of an emergency, not least because the Supreme Court has been known to hold that where there is an emergency, the creditor need not put the debtor in notice of breach.²³⁷ The

²³⁴ *Supra*, note 225

²³⁵ The possibility of replacement is sometimes analysed as unilateral rescission: see note by Ghestin on *Cass. com.*, 15 Jan. 1973, *D.* 1973, 473, 475.

²³⁶ Ghestin, *Conformité et garantie dans la vente* (1983), para. 183 ff.; Simler, "La Resiliation Unilatérale Anticipée du Contrat à Durée Déterminée", *JCP* 1971.1.2413.

²³⁷ See *Affaire Mbomiko Ibrahim v. Soitacam*, discussed above, note 177

Supreme Court has equally accepted, albeit *obiter*, that the parties can waive the requirement of judicial control so long as any clauses for automatic rescission are expressly provided and agreed upon. In *Affaire Dieye Assane v. Société Immobilier Camerounais*,²³⁸ the parties entered into a contract of lease, the appellant being the tenant. Clause 3 of the contract read thus:

"En cas de non-payement d'un terme et quinze jours après une mise en demeure par la lettre recommandée restée sans effet, le présent bail est résilié de plein droit... sans pour cela que soit besoin d'une décision judiciaire".

In effect, only a notice of default was required of the creditor, a court order having been expressly excluded. The appellant defaulted and the respondents duly served him notice. But before the expiry of the agreed 15 days after notice, the respondents applied and obtained a court order for rescission. The Supreme Court observed that the parties had unequivocally waived the need for a court order and found nothing wrong with that clause but went on to quash the decision of the lower court on the grounds that the respondent could not exercise his right of rescission before the agreed 15 days after notice to the appellant had elapsed. So, in Cameroon too, it is risky business for a party to undertake extra-judicial, unilateral rescission as the court may eventually hold that it was unjustified or unwarranted at great expense to the creditor. That risk certainly was not lost on the creditor in the case just considered, who still thought it necessary to apply for a court order even though the contract had clearly relieved him of that requirement.

Although judicial control is said to be the hallmark of the civil law system, it is interesting to note that the courts in Common Law Cameroon are not always receptive to self-help either. True, the common law does not, in principle, require judicial intervention for rescission, yet there is a growing tendency among some judges in Common Law Cameroon to frown upon extra-judicial rescission. In *Mancho Sammy v. Credit Foncier*,²³⁹ the defendant building society unilaterally rescinded a loan

²³⁸ Arrêt No. 53 du 23 Mai 1972 (1972) no.26 B.A.C.S., 3626.

²³⁹ *Supra*, note .

agreement by refusing to disburse the last instalment to the plaintiff on the grounds that the plaintiff had failed to satisfy a condition precedent of the contract: that he will deposit his land certificate with the defendants before the disbursement of the last instalment. Having rescinded the contract, the defendants also went on to exercise their Treasury Rights over the plaintiff's salary in a bid to recoup all that had already been paid to him. The court had no difficulty in establishing that there was indeed such a condition precedent which the plaintiff had clearly not fulfilled. But the crux of the matter was whether the defendants were entitled to automatic rescission. Counsel for the plaintiff argued vigorously that what should follow naturally and logically from such breach (if there was any), is a court action by whoever claims to be the victim of the alleged breach. Only the court, he concluded, should be able to say if the disputed contract has been breached, and if so by whom and then enter the appropriate order or orders. For his part counsel for the defendant was content to say that the victim of a breach has a legal right to resort to any reasonable means to recover any sums he is owed, and added that, "this does not necessitate the intervention of the court". Ruling on this issue, Tengono J. warned that it was "particularly dangerous and highly risky, thus compromising the security of contracts" if a party to a contract was to assume the double role of party and judge. He therefore sided with counsel for the plaintiff that the court alone should decide on whether or not a contract has actually been breached. This kind of insistence on judicial intervention by a common law court may be put down partly to cross-fertilization or rather, may be considered as an example of an established civil law practice creeping into the common law jurisdiction.²⁴⁰ But it may also be that judges, even those of an entirely common law persuasion, generally dislike self-help, perhaps because they see it as usurping their powers or role. In an earlier case,

²⁴⁰ The judge concerned in this case, Tengono J. is an Anglophone who prior to his transfer to the common law jurisdiction (Bamenda), had worked in the civil law jurisdiction. It is therefore not unlikely that his legal reasoning must have been shaped or reshaped, even if only to a small extent, by some civil law conceptions and judicial attitudes.

Robert Njeshu Lamyam v. Jacob Tanya Tatnem,²⁴¹ the Court of Appeal strongly condemned the appellant for rescinding the contract (by seizing the car that was the subject of the sale contract) without seeking judicial approval. It is regrettable though, that in the Court of First Instance, Magistrate Munongo, also lamenting the failure of the appellant to enlist the help of the law, felt that the appellant should have sought the intervention of the Police: "He did not call in the aid of the Police". In light of what has already been said about Police involvement in the enforcement of contracts,²⁴² such a suggestion, especially coming as it does from a court official, is mind-boggling to say the least.

The above case also highlights the dangers of undertaking non-judicial, unilateral rescission. The case concerned the sale of a bus. Part of the price was paid instantly with the balance to be paid later. When it was not forthcoming, the appellant (seller) without the knowledge or consent of the respondent (buyer), seized and sold the bus while it was in a garage undergoing repairs. The appellant did so in the full confidence that the contract was one of hire purchase which the respondent had breached and which gave him the option of seizure since the property in the goods would not have passed to the buyer. But the court ruled that it was a contract of sale for which the property in the goods had passed to the buyer. The appellant's only course of action therefore was an action of the balance of the price and damages for breach of contract but not seizure. But because of the illegal seizure, the appellant, far from the being the victim of breach, was himself guilty of breach of the contract of sale and found himself in the vulnerable position of being charged with conversion by the buyer, if he was so minded. It may therefore be advisable for any party alleging breach, especially if the breach is disputed, to seek clarification from the courts as to whether there is indeed a breach and as to what is the proper rescission is the proper remedy. But to suggest, as Tengono J. appeared to do in the *Mancho Sammy* case above, that "only the court alone" can decide on these issues, is too

²⁴¹ BCA/31/83 (Bamenda, 30-3-1984, unreported).

²⁴² See the section on specific performance above.

sweeping and cannot be said to categorically represent the position of the law on this topic in Common Law Cameroon. Despite signs of hostility towards self-help, it will be correct to say that the common law rule which holds that rescission does not need judicial control is still true in the common law jurisdiction of Cameroon.

4. CONCLUSION.

Given that so much has so far been considered on the battery of remedies available to an aggrieved party, it will be useful by way of conclusion, to recapitulate some of the main points. As concerns the common law the remedy of damages takes precedence over that of specific performance, with rescission being somewhat marginal. And while the famous dictum of Holmes that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it - and nothing else"²⁴³ should not be taken literally or too seriously,²⁴⁴ it has to be said that the common law rules in their total effect express a concealed value judgement which is hostile to the notion that the plaintiff is entitled to specific performance. It was pointed out that there is now an increasing willingness in England to grant specific performance but that there is no such corresponding evidence in Anglophone Cameroon. The Cameroonian common law courts, more than their English progenitors, stick to the rule that an action for specific performance and the attendant injunction, is the exception rather the rule. A potential plaintiff, apart from being unable to obtain a decree of specific performance, will also find it hard to attempt to secure performance by fixing and enforcing a penalty; and if the defendant does not perform, the plaintiff though able to sue for damages, is expected to mitigate any loss.

In contrast, the civil law was shown to be committed to the notion that the primary objective is performance. This is confirmed by the number of legal solutions such

²⁴³ *"The Path of the Law"* (Collected Legal Papers p.175); (1897) 10 Harv. L.R 462.

²⁴⁴ Nicholas (p. 206), regards it as exaggerated.

as judicial assessment of the severity of the breach, to justify rescission; the role of *astreinte*, but also the requirement of *mise en demeure*, conferring on the debtor a last chance to perform, and perhaps even the terminology which regards an award of damages as a substitute for performance. At the heart of this is discernible a commitment to the principle of the binding quality of contracts: "the law of the parties", in the words of article 1134 of the Code must be respected like the law of Parliament. This principle has so often be reiterated by the courts in Civil Law Cameroon that it will take too long to enumerate and discuss them.

It was also noted that despite the pre-eminence of performance, the ranking of remedies in Civil Law Cameroon is more a question of the circumstances, with the remedy best suited to the situation being adopted. And that remedy for most parties appears to be an action for damages, not performance. Obviously, where the relationship between the parties has been seriously strained, many an aggrieved party has found it more practical to seek damages against the defaulting party rather than insist on performance.

As concerns termination, it was noted that under the civil law a much clearer distinction is drawn between withholding performance and outright rescission while the two are very closely linked under the common law. Another distinguishing feature between both systems is the judicial character of rescission under the civil law. However, it was revealed that the common law courts do not entirely embrace or condone self-help.

This study may not have canvassed the entire body of contract law covered by damages, and it was never intended to do so, yet it is hoped that it does provide sufficient insight into that important area of the law in Cameroon.

CHAPTER 9.

THE FUTURE OF CONTRACT LAW IN CAMEROON.

This thesis has not covered all fundamental areas of contract law, but it neither intended nor promised to do so. However, it is believed that of those topics covered, sufficient has been said to depict the working and the state of contract law in Cameroon. In what state, therefore, is the law of contract? Is it in a state of regression, stagnation or progression? To talk of regression would be alarmist, especially if one accepts the fact that the received laws were still very much in their infancy in the years immediately after independence. On the other hand, any talk of progression would be an overstatement, in view of the conspicuous absence of any worthwhile developments. On the evidence of the analyses so far, it would be fair to say that contract law in Cameroon is in a state of stagnation. Perhaps it would be better to describe it as "non-developmental".¹

In this closing chapter, it is not necessary to repeat the individual issues already considered during the course of this study. Instead, it is proposed to look at the whole study from a macroscopic rather than a microscopic perspective. I shall say straightaway that no major significant development, judicial² or legislative,³ can be

¹ Family law in Cameroon has also been described as such, see Ngwafor, "*Family Law Trends in Cameroon: A Non-Developmental Process*" (1985) Annual Survey of Fam. L., 5-15.

² One thing of note worth mentioning is the extension to Common Law Cameroon of the special character of administrative contracts which Civil Law Cameroon inherited from France. This implies that the law of contract in Common Law Cameroon is different from that in England and other common law jurisdictions in one important respect, namely, that it recognises a special regime for administrative contracts.

said to have taken place in Cameroon ever since independence. That is why I take the view that the development of contract law has stagnated.

In the course of this study, I have been able to detect two diametrically opposed trends in Cameroonian judicial attitudes. The one is the marked reticence by the courts to break with English and French conditions of the past that may have no place in present day Cameroon. This sometimes leads to a ritualistic, and often mechanistic, application of rules of English and French contract law. This practice, which was most prevalent in the years immediately after independence, can be put down to the dominance of the judiciary at the time by expatriate (British and French) personnel. The other trend, and this is the more recent one, is the marked absence of any reference to English or French law, or any reference to any law for that matter. In other words, the courts do not expressly state which rules of law they are applying. That explains why in some of the cases considered in this thesis, it was left for me to imply, depending on the decision arrived at, the rules of law that were applied by the court.

In the light of these contrasting trends, both of which are criticised below, the single most important desideratum for contract law in Cameroon is for the received English and French laws to be adapted and attuned, where appropriate, to peculiar Cameroonian realities. This is neither an exciting nor a thundering proposition, yet it is strongly submitted that whatever changes may be needed to give contract law a forward push must revolve around this simple proposition. I shall now elaborate on this theme.

The problem of adaptation in Cameroon of rules of English and French contract law is a dual one. The first relates to what I shall call contemporary relevance. By this I mean that the law of contract must evolve with the society which it purports to govern. It must keep pace with changing conditions of its society. It has then to be

³ One may also mention the various statutes that have been passed by the Cameroonian legislator in the area of formality in contracts, not so much to supplant but to strengthen those that were already in place as part of the general English and French law.

recognised that some age old broad general principles of English or French law of contract may be insufficient in themselves to provide for some present day Cameroonian conditions. However, the need for contemporary relevance is not confined to Cameroon. It applies to other societies. Lord Wright made the point splendidly in the case of England when he observed:⁴

"When we examine the accidents of procedure or judicial or social intolerance or prejudice out of which so many dogmas and rules originated, and see to what different conditions and circumstances they were adapted, we are less likely to view them all with superstitious veneration; we are freer to consider how far, with conditions of life and thought, they fit in with reason, justice and convenience".

Carbonnier has also made the point for contemporary relevance in France when he talks of the need to take *"une voie moyenne: entre le passé et l'avenir..."*.⁵

The other problem relates to the differences in the conditions and realities, whether past or present, between England and France on the one hand, and Cameroon on the other hand. The predicament in Cameroon therefore is doubly difficult in that not only is the universal problem encountered of age old concepts that may be unsuited to contemporary conditions but also the problem that concepts based on the received laws may in some cases be alien to the attitude and ways of the local community. On the factual basis of such differences, the view is taken that it is not always proper for Cameroonian courts to apply to a local problem solutions worked out in England or France.

Where a Cameroonian court recognises the unsuitability of a rule of English or French contract law or of a particular English or French decision but renders a decision giving lipservice to that rule or to the doctrine of *stare decisis*, the most problematical of alternatives obtains. In the first place, the mechanistic application of the received laws, especially in the face of compelling Cameroonian peculiarities is sometimes bound to result in risible justice. But even where a "just result" is

⁴ Wright, **Legal Essays and Addresses**, 1939, preface, p. XVII.

⁵ Carbonnier, *Introduction*, In: **L'Evolution Contemporaine du Droits des Contrats**, Journées Savatiers, 1986, p. 30.

achieved, and there are cases in which Cameroonian courts' distortions of English cases or rules of French law have produced illogical but just results, neither continuity and certainty nor adaptability of the law are achieved. The law is not really adapted since on the surface the old English or French rule survives.

Ultimately, legal rules, whether derived from English or French law, are justifiable only in terms of their justice and social utility. It can no longer be true to say, if it ever was, that the use of terms such as "judicial policy" and "social expediency" introduces "deleterious foreign matter into the water of the common law".⁶ Undoubtedly, precedent and tradition are important, and often compelling, considerations in legal reasoning. But the law in Cameroon should not be enslaved to the received English and French customs and usages of the past, however beguiling their judicially enshrined legacies may at first appear. Respect for received solutions to problems presented by recurring social phenomena must be balanced against a recognition of the inevitable movement and diversity of society. The continued relevance of the English common law and the French civil law, and possibly their very existence in the Cameroonian setting, demands that their rules be subject to constant scrutiny and adjustment in the cold light of social reality.

If countries such as Australia⁷ and New Zealand,⁸ with arguably closer cultural, educational and political ties with Britain, have conceded and are responding to the emerging differences between their respective common law and that of the England, then, a fortiori, Cameroon should act with even more decisiveness. The most fitting example in this regard however must be Canada. Like Cameroon, her laws are traceable to the English common and French civil law. Yet while Canada still draws nourishments from these sources, few would demur that the Canadian courts and

⁶ *Rootes v. Shelton* (116) C.L.R. 383 at 386-387, per Kitto J.

⁷ See e.g. Ellinghaus, "An Australian Contract Law" (1989/90) 2 J.C.L. 13-33; Ellinghaus, Bradbrook, and Duggan, *The Emergence of Australian Law*, 1989.

⁸ Sir Robin Cooke has recently proclaimed that "a distinct New Zealand national legal identity" has emerged. See Cooke, "The New Zealand Legal Identity", speech delivered at the New Zealand Law Conference, October 1987, p. 2.

legislator have developed and encouraged more distinctly Canadian approaches to law. This is true of both the common and civil law Canada.⁹

Contemporary relevance need not be achieved at the expense of certainty in the operation of the law. Nor should the need to take into account differences between two countries involve the revolutionary overthrow of the established received laws. This point brings to me the second, and even more worrying, judicial trend in Cameroon. A close look at recent judicial decisions by Cameroonian courts will lead to a shocking revelation, which is the almost total lack of authorities and articulation of rules of law. The vast majority of recent decisions are singularly void of any case law precedent, either local or foreign. So, one often finds a change from a situation in which there is an almost ritualistic use of English precedence to one in which none is used at all. As in the former situation, there is not much to commend in the latter case. For a common law judgement to contain virtually no scintilla of authority is unacceptable.

Perhaps Cameroonian judges do not bother to explain and justify their decisions in the safe knowledge that there is not at present a large group of sophisticated critics to analyse the words and effect of those decisions and because the general public is still mystified by and less interested in the work of the courts. But that is bound to change, if not sooner then later. Whatever be the case, it is important for the courts to express clearly in their decisions exactly what it is that they are doing and why. In doing so, they must reflect the conditions and realities in Cameroon, and ensure that all relevant considerations of policy are at all times articulated and explored. It has been stated:¹⁰

"The fundamental root, the base, of contract is society. Never has contract occurred without society; never will it occur without society;

⁹ For the common law, see Milner, *"The Common Law of Contract: Some Aspects of Form, Agreement and Consideration"* In: McWhinney, ed., **Canadian Jurisprudence - The Civil Law and Common Law in Canada**, 1958, pp. 90-117; For the civil law, see Cr  peau, *"La Theorie G  n  rale des Contrats dans le Droit Civil de la Province de Quebec"* In: McWhinney, ed., pp. 119-143.

¹⁰ McNeil, **The New Social Contract**, 1980, pp. 1-2.

and never can its functioning be understood isolated from its *particular* society."

On the question of the slavish application of the received laws, the courts in Francophone Cameroon are more culpable than their Anglophone counterparts. One can of course raise the argument in their defence that they are given little room for judicial innovation because of the primacy of the Civil Code in particular, and legislation in general. Yet, there are instances in which the Code is silent, some of which are highlighted in this study. In such cases, it cannot be said that Cameroonian civil law courts have seized the initiative to develop a distinctive Cameroonian solution. Instead, their visceral reaction has always been to look up to solutions worked out in France, ignoring of course that such solutions might have been arrived at in response to policy and other considerations that may be relevant only to France. It is not suggested that such solutions cannot work in Cameroon. In fact they often do, though not necessarily *faux de mieux*. In other words, Cameroonian civil law courts will never be in a position to know whether there can be a more inspired local solution to any problem if they continue to be diffident in their own innovative ability.

It is not only those areas where the Civil Code is silent which call for judicial intervention. Without suggesting that the courts should flout the provisions of the Code, one must nevertheless remind them of the need to reconsider very seriously those provisions that are glaringly anachronistic. It is certainly not asking too much of the courts to undertake a subtle manipulation of such provisions so as to circumvent any harsh or strange results which their rigorous application may bring about. And in doing so the courts can find justification, if any is needed, in the fact that the French Civil Code, of which the present Cameroonian Civil Code is merely a copy, was not drafted in response to Cameroonian conditions. No less a figure than René David has conceded that "the individualism of the French civil code is not necessarily suitable for all societies and can be tempered by societies, whether

traditional or modern, where a collective spirit prevails".¹¹ Even in France, this individualistic ethic is no longer as profound as it used to be. The social and economic metamorphoses that France has undergone this century have sapped the individualistic philosophy of some of its vigour.¹²

It may be true that the civil law does not expressly recognise the doctrine of precedent, but the French *Cour de Cassation* and the lower courts in France often refer to "*jurisprudence constante*" (established case-law) in their judgements. The civil law courts in Cameroon, with the limited exception of the Supreme Court, have failed to do so.

Cameroonian common law and civil law courts must realise that it is only by shaping the received English common law and French civil law of contract to accord with Cameroonian circumstances, needs and values that the independence of contract law in Cameroon will become more pronounced. The autonomous quality of a nation's case-law lies in the shape in which it is cast by the particular situations brought before its courts. This point has been emphasised most brilliantly by Fuller¹³ with regard to the common law:

"The courts of the common law do not lay down their rules in advance, but develop them out of litigated cases. This inevitably means that the shape taken by legal doctrine in a particular jurisdiction will be influenced by the accidents of litigational history within that jurisdiction."

To suggest that Cameroonian courts should "Cameroonise" their decisions does not imply that they must desist from citing and having regards to English and French decisions. I have deplored the overt and excessive reliance on English and French solutions but the way forward is not by a complete severance of the link between decisions arrived at in England or France. To do so would only amount to what the

¹¹ David, "*Contract law and Civil Wrongs in French speaking Africa*" In: **Integration of Customary and Modern Legal Systems in Africa**, 1964, p.165.

¹² See Mestre, "*L'Evolution du Contrat en Droit Privé Français*" In: **L'Evolution Contemporaine du Droit des Contrats**, Journées Savatier, 1986, p. 42.

¹³ Fuller, **Anatomy of Law**, Penguin, 1971, p.139.

American philosopher Morris Cohen calls "the principle of polarity", which is to say that to ignore either pole of a problem is to miss the full reality. On the one hand, to insist on applying only those solutions developed in England and France is to underestimate the differences in social and economic conditions that exist between Cameroon and these western countries. On the other hand, to insist on applying only Cameroonian solutions to local contractual problems, is to overestimate such differences.

I accept that Siedmann's theory about the non-transferability of laws¹⁴ is generally correct. However, I do not believe that it retains a discomforting relevance to contract law in Cameroon. In other words, while there are differences between Cameroon, and England and France that warrant different judicial attitudes and legislative solutions,¹⁵ there are equally enough similarities to justify the continuous relevance of English and French contract law to Cameroon.¹⁶ It is desirable therefore that Cameroonian courts should continue to have regard to significant developments in the law of contract of other countries such as England and France where a number of legislative reforms and judicial innovations have been undertaken with apparently beneficial results. Cameroonian courts need a path finder as they chart the legal course.

The point has been made that most of the private law of all the modern legal systems of the Western world (and also of some non-Western countries), apart from the Scandinavian, derives more or less directly from either Roman Civil Law or

¹⁴ See Siedmann, *Op. cit.*, chap. 1, note 21.

¹⁵ In this regard, one may cite as an example the fact that many Cameroonians are still governed by native law and custom. In chapter it was suggested that the non-native courts must take judicial notice of this reality when confronted with a case in which the parties contemplate customary law.

¹⁶ As commerce expands and becomes more sophisticated, it may be imperative for Cameroon to look up to England and France, who already have sufficient legal experience in dealing with the problems that such growth gives rise to. This may be very important from an economic point of view, especially in attracting the foreign investor.

English Common Law.¹⁷ Cohen and Cohen,¹⁸ discussing contract, make this interesting observation:

"And if the diversity of theories of contract is startling, one may find equal cause for wonder and reflection in the fact that thinkers and societies that are poles apart geographically, economically, and culturally, so often agree on specific rules of contract. The excerpts from the Civil Code of Spain showing basic contract rules equally valid in France, Chile, Colombia, Germany, Holland, Italy, Mexico, Portugal, and many other lands, and equally honored across eighteen or more centuries, offer a substantial challenge to the view that law reflects all the changes of changing economics and all the diversities of diverse civilizations."

Echoing this observation in France, Carbonnier has said,¹⁹ with regard to the relevance of comparative law, that, "*C'est une opinion répandue qu'il aurait un rôle à jouer, plus considérable qu'ailleurs, dans le droit des contrat*".

I am therefore firmly of the view that Cameroon should maintain the received common and civil laws, but at the same time, Cameroonian courts must seek to achieve solutions suited to particular circumstances and community values in Cameroon.

The responsibility for shaping the future of contract law in Cameroon cannot and should not be borne entirely by the courts. The academics and the legislator must play their part. If, as proposed, the courts start to pursue initiatives which may not always be the same as those taken in England and France, it will be incumbent on Cameroonian academics to analyse those decisions for the benefit of the domestic

¹⁷ Watson, **Legal Transplants- An Approach to Comparative Law**, 1974, p. 22. He also cites Roscoe Pound who has written that, "The history of a system of law is largely a history of borrowing of legal materials from other legal systems and of assimilation of materials from outside the law."

¹⁸ Cohen and Cohen: **Readings in Jurisprudence and Legal Philosophy**, 1951, p. 101.

¹⁹ Carbonnier, Op.cit., note 5, p.32.

audience, and, indeed, the broader international legal community.

The legislator has by far the most important role to play in the quest for an improvement in the state of Cameroonian contract law. Most of the required reform, especially in areas such as conflict of laws and formality in contracts, would have to be kick started by legislation. I make no claims that legislation would solve all the problems that come across the whole spectrum of contract law in Cameroon. But I remain convinced, in view of the judicial indifference to innovation, that it may be the best way to bring about change.

The final form of legislation on any issue must not be extemporaneous. It must be the subject of intensive study and criticism. I believe that the responsibility for making proposals for reform is very largely that of academics. The academic certainly cannot legislate but he can at least point to the undesirability of existing rules of law, to the desirability of substituting them for others and to possible ways of bringing them about. What is therefore needed are concrete proposals for reform rather than suggestions that somebody else should do something. It is in response to the belief that a beginning must be made somewhere, for nothing can be gained by hesitation and diffidence, that I have produced this thesis. It may not have been about reform, yet it may serve to assist those who may be called upon to formulate proposals for reform. Even more importantly, it is hoped that this study may serve as a starting point for future discussion, or as a stimulant for further, wider and deeper studies of contract law in Cameroon.

As I end this long and often lonely exercise, it is my parting wish that I have not fallen foul of Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do. In other words, I hope that I have sustained my promise to contribute to the description, presentation and analysis of contract law in Cameroon.

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